United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,254

ACE VAN & STORAGE CO., INC.,

Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILTON M. BURKE

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Washington, D. C

Attorney for Appellant

QUESTION PRESENTED

The question presented by this appeal is:

Whether the trial court was justified in holding that the appellee was not liable on its insurance policy because appellant did not file a proof of loss within the ninety day period provided by the policy, when it appears from the uncontradicted testimony:

(1) that appellee's agent, prior to expiration of the ninety days, signed a memorandum stating: "The representative of the Ace Van & Storage Company, Inc. and of Liberty Mutual Insurance Company will continue the investigation to as prompt a disposition of this matter as is reasonably possible;"

(2) that the purpose of the quoted portion of the memorandum was to extend the time for filing proof of loss;

(3) that a proof of loss was filed twenty-one days after the expiration of ninety days;

(4) that appellee, after the expiration of the ninety days and after filing of the proof of loss, did not deny liability on the policy, but negotiated for a settlement of appellant's claim; and

(5) that appellee made no mention of appellant's failure to file a proof of loss within ninety days of discovery of the loss, until appellant filed suit against appellee some six months after filing of the proof of loss.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had original jurisdiction in this action under the provisions of Title 11, Section 306, D.C. Code, 1961 Edition.

This is an appeal from the judgment of that Court entered for appellee, and jurisdiction herein is based on Title 28, Section 1291, United States Code.

STATEMENT OF CASE

This is an appeal from a judgment for the appellee entered by the lower Court after a trial without a jury (J.A. 115).

This action involved a suit brought by appellant, a moving and storage company, to recover, as the insured, on a loss under a crime policy of insurance, against the appellee, the insurer. The appellant purchased the said crime policy from the appellee (J.A. 15). The policy insured the appellant against losses caused by dishonesty of its employees (J.A. 71).

During the period the policy was in force, the appellant learned, on October 9, 1959, that one of its employees in Norfolk was dishonest, and that losses had apparently been caused to appellant by the said dishonesty (J.A. 16, 17, 18). That day appellant called appellee and informed appellee of this situation and a conference was held with a representative of appellee and appellant's accountant and lawyer (J.A. 18). It was agreed at the conference that a very complicated embezzlement was involved and that it was going to involve considerable time and effort to gather the facts and figures that would satisfy the requirements of the policy. It was further agreed that appellant's president would meet with a representative of the appellee in Norfolk, Virginia and that the dishonest employee would be criminally prosecuted (J.A. 18, 19). Mr. Gruber, appellant's accountant, was concerned with the time element in preparing the supporting evidence for appellant's possible claim under the policy as the policy refers to a ninety-day period (J.A. 63). The policy provides, in Condition No. 7: "Upon the discovery by the insured of any loss or damage, the insured shall: . . . (b) file proof of loss with the company within ninety days after the loss or damage, unless such time is extended in writing by the company, in the form and manner required by the company." (J.A. 74.) Mr. Gruber

asked that a paragraph be inserted in a memorandum of the conference proceedings to clear up uncertainties as to how much leeway appellant had in making proof of claim (J.A. 63, 64). The paragraph referred to by Mr. Gruber in the memorandum signed by the president of appellant and by Mr. Grier, representative of the appellee, reads:

> "3. The representatives of Ace Van & Storage Company, Inc., and of Liberty Mutual Insurance Co. will continue the investigation to as prompt a disposition of this matter as is reasonably possible." (J.A. 77.)

The reason for including the above quoted paragraph in the memorandum was to show the agreement of the parties at the conference that additional time may be required to gather the proof necessary to support the claim, which would entail correspondence with moving and storage companies throughout the country as well as exhaustive studies of appellant's records in Washington, D. C. and Norfolk, Virginia (J.A. 20, 21).

Three days later the appellant's president went to Norfolk and met with a representative of appellee and they discussed the case and obtained a statement from the dishonest employee (J.A. 23, 24). Appellant's president subsequently made several trips to Norfolk from Washington, D. C. to investigate the case, and ascertain the losses, which investigation took four or five months (J.A. 27, 28, 37). Appellant's accountant testified that the gathering of the information probably required as much as four months (J.A. 69). Appellant also engaged accountants in Norfolk to aid in the investigation (J.A. 30). The Norfolk accountants made an audit (J.A. 31-34) and a report of the audit dated December 30, 1959 was sent to the Norfolk Commonwealth's Attorney to assist in the prosecution of the dishonest employee (J.A. 82).

Appellee's representative, Mr. Grier, mailed appellant's attorney a letter dated November 10, 1959 which stated, inter alia: "We are

submitting a proof of loss form to Mr. Morrissett which he can complete and return with all supporting information on the loss." Appellant filed a proof of loss on February 1, 1960, twenty-one days beyond the ninety day period from October 9, 1959 (J.A. 55, 88, 89).

Appellant's president testified that sufficient figures were not available prior to February 1, 1960 for the preparation for the proof of loss (J.A. 38, 61). Subsequent to the filing of the proof of loss, representatives of the appellee met with appellant's president (J.A. 38).

In April of 1960, a representative of appellee met with appellant's president and accountant and produced an audit prepared on behalf of appellee, dated April 13, 1960, and discussed settlement of appellant's claim (J.A. 38, 39, 65, 66, 90-105). The conference was arranged at appellee's request and the purpose of it was to discuss appellee's audit and the items included in it, particularly with regard to those items which were questioned, and those items which were denied (J.A. 66). There were subsequent conferences between appellant and appellee and appellee never gave any indication to appellant that appellee considered the filing of proof of claim improper (J.A. 39, 68).

Appellant filed suit against appellee on August 3, 1960 (J.A. 1). Appellee's Answer, filed August 24, 1960, alleged as a Fourth Defense that the claim was barred for failure to file proof of loss within one hundred twenty days after discovery of loss (J.A. 3, 5). The case was tried without a jury and judgment entered for the appellee against the appellant, on September 9, 1963 (J.A. 115).

STATEMENT OF POINTS

1. The trial court erred in that its finding for the appellee was contrary to the evidence.

2. The trial court erred in that its finding for the appellee was contrary to the law.

3. The trial court erred in finding, despite uncontradicted evidence to the contrary, that there was no written agreement to extend the time for filing a proof of loss, and that appellant's exhibit No. 2 does not constitute any agreement on the part of the appellee to waive the provisions of Section 7 of the policy.

4. The trial court erred in finding, despite uncontradicted evidence to the contrary, that there was no agreement of any kind to extend the time for filing a proof of loss.

5. The trial court erred in finding, despite uncontradicted evidence to the contrary, that appellee never waived the policy provision for filing a proof of loss within ninety days of discovery of loss.

SUMMARY OF ARGUMENT

I

Appellee waived its requirement for filing of a proof of loss statement within ninety days of discovery of the loss, by signing, prior to expiration of the ninety days, a memorandum extending the time. The policy provides that the time for filing proof of loss can be extended in writing by the company, and the uncontradicted testimony shows that the purpose of the memorandum was to extend the time for filing proof of loss.

II

Appellee waived its requirement for filing of a proof of loss statement within ninety days of discovery of the loss, by accepting a proof of loss statement after expiration of the ninety days, by negotiating, thereafter, for a settlement of appellant's claim under the policy, and by not mentioning appellant's failure to file a proof of loss statement within ninety days of discovery of the loss, until appellant filed suit against appellee some six months after filing of the proof of loss. The uncontradicted testimony shows that the ninety day requirement was raised as a defense to appellant's claim for the first time, after suit was filed. Every action by the appellee indicates that it had considered the ninety day requirement waived, as had the appellant. The law is clear that any insurance policy's requirement for filing of a proof of loss statement, can be waived by the insurer's failure to assert it as a defense and by negotiation for a settlement of claim; the only reasonable inference from the uncontradicted testimony is that it was waived in this case.

ARGUMENT

I.

APPELLEE WAIVED REQUIREMENT FOR FILING OF PROOF OF LOSS WITHIN NINETY DAYS OF DISCOVERY OF LOSS BY SIGNING MEMORANDUM EXTENDING TIME

The uncontradicted evidence is that the president of appellant and a representative of appellee, signed a memorandum when the loss was first discovered, which was intended by both parties to extend the time for filing of proof of loss by appellant (J.A. 20, 21, 63, 64, 74, 77). The appellee did not choose to put its representative who signed the memorandum on the witness stand, and neither did it produce any testimony to contradict that of appellant. The trial court is clearly in error in finding that there was no written agreement to extend the time for filing a proof of loss, and that the said memorandum does not constitute such a written agreement. It is settled law that a finding is clearly erroneous if there is no substantial evidence to support it. Eg., Baltimore Dairy Lunch v. United States, 231 F.2d 870. However, in the present case, there is not even a scintilla of evidence to support the finding below. The evidence opposing the finding is uncontradicted.

II.

APPELLEE WAIVED REQUIREMENT FOR FILING OF PROOF OF LOSS WITHIN NINETY DAYS OF DISCOVERY OF LOSS, BY ACCEPTING PROOF OF LOSS AND NEGOTIATING FOR SETTLEMENT OF CLAIM

The appellant filed a proof of loss with appellee on February 1, 1960, twenty-one days after expiration of the ninety day period provided in the policy (J.A. 55, 88, 89). Appellee accepted the proof of loss and never claimed that proper and timely proof of loss was not filed, until suit was filed against it by appellant, some six months later (J.A. 39).

After filing of the proof of loss, appellee conferred with appellant on several occasions, and even presented an audit, dated April 13, 1960, to use in settlement (J.A. 38, 39, 65, 66, 90-105). A conference was held to discuss appellee's audit and the items included in it, particularly with regard to those items which were questioned, and those items which were denied (J.A. 66). There were subsequent conferences between appellant and appellee, and appellee never gave any indication to appellant that appellee considered the filing of proof of claim improper until after suit was filed (J.A . 1, 39, 68).

The above-stated uncontradicted facts clearly indicate a waiver, by appellee, of the requirement that proof of loss be filed within ninety days of discovery of the loss.

COUCH, CYCLOPEDIA OF INSURANCE LAW states the general rule applicable to this case, at page 5567 of Volume 7: "The numerical weight of authority is to the effect that investigation of a loss and negotiating for settlement waives formal notice and proofs of loss, especially if the insured is led to believe that further compliance with the contract requirements is not necessary."

No District of Columbia cases have been found dealing with this precise question. A Maryland case does present the precise situation found in the present case.

In Rokes v. Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323, the court said (pp. 519-521).

> "Admitting, however, for the purpose of this case, that proofs of loss were not furnished within the time prescribed by the policy, the main question is, whether there is evidence legally sufficient to show a waiver of this condition on the part of the appellee.
>
> "But it is argued that the failure to furnish the proofs within time stands upon different grounds because the insured having by his own default forfeited the right to recover on the policy, he is not in any manner injured or prejudiced by the subsequent acts and conduct of the

insurer. And it is contended, therefore, that a new consideration or an express agreement on the part of the insurer, is necessary to renew or give vitality to the policy.

"We have carefully examined all the cases within our reach on this branch of the case, and are of opinion that the contention of the appellee is unsupported either by principle or by the weight of authority.

"Preliminary proofs are required for the benefit solely of the insurer, in order that he may ascertain the nature, extent and character of the loss; and the condition in the policy in respect thereof, being inserted for his benefit, there is no reason why he may not waive or extend the time within which such proofs are to be furnished. Nor is it necessary to prove an express agreement to waive. On the contrary, it may be inferred from the acts and conduct of the insurer inconsistent with an intention to insist upon the strict performance of the condition. Tayloe v. Ins. Co., 9 How. 390; Post v. Ins. Co., 43 Barb. 351; Phillips v. Ins. Co., 14 Mo. 220; Owens v. Ins. Co., 57 Barb. 518; Graves v. Ins. Co., 12 Allen 391; Dohn v. Ins. Co., 5 Lansing 275."

The same reasoning is found in Citizens' Mut. Fire Ins. Co. v. Conowingo Bridge Co., 116 Md. 422, 82 A. 372, 378-79 (1911). Campbell v. National F. Ins. Co., (Mo. App.) 269 S. W. 645, likewise holds that an insurer, by proceeding, after receipt of proofs of loss, to investigate the same, requesting further documentary evidence, and conferring with, and taking under consideration an offer of settlement made by, the insured, waives any right arising from the fact that such proofs were not furnished within the time stipulated in the policy.

Similarly, courses of conduct like that in the present case have been held to constitute a waiver of the form of proofs of loss. In Firemen's Ins. Co. v. Floss, 67 Md. 403, the court said (pp. 416-418):

> "2. The next question raised relates to the preliminary proofs of loss, alleged to be defective for non-compliance with the requirements of the contract .. . . as we are clearly of opinion that the right to take advantage of any

defects or irregularities in such preliminary statement or proofs of loss has been waived by the defendants.

"Good faith requires of an insurance company frank and open dealing with the assured, and if there be any withholding or failure to disclose objections to preliminary proofs, beyond a reasonable time after they are furnished, or if refusal to recognize the obligation to pay be placed upon other and distinct grounds than alleged defects in preliminary proofs, the company will be regarded as having waived all objection that could otherwise have been taken to such preliminary proofs as furnished. Here the failure to make known the objection, notwithstanding the lapse of time; the fact that the defendants had themselves with others, instituted an investigation into the circumstances and extent of the loss, and the placing the refusal to pay upon other and distinct grounds than the want of sufficient proofs, furnish the amplest ground for holding all objection to such proofs to have been waived by the defendants. If authorities for this proposition be needed, it is only necessary to refer to Allegre v. Ins. Co., 6 H. & J. 408, 412, 413; Ins. Co. v. Deford, 38 Md. 404; Rokes v. Ins. Co., 51 Md. 520; Ins. Co. v. Engle, 52 Md. 485; May on Ins. secs. 468-9. For additional authorities, see also 49 ALR 2 182, Continental Insurance Co. v. Burns, 144 Md. 429, 437, 125A. 232; Taubman v. Allied Fire Ins. Co. of Utica, et al. (CCA 4, 1947) 160 F. 2d 157, 162."

In Franklin Fire Ins. Co. v. Chicago Ice Co., 36 Md. 102, 11 Am Rep 469, it was held that failure to promptly object to form and sufficiency of notice and proofs of loss constituted waiver. Negotiations looking to a settlement, commenced prior to the furnishing of proof and continued thereafter, waive a provision requiring proofs within a specified time. Dierssen v. Williamsburg City F. Ins. Co., 204 Ill. App. 240. Acting upon defective proofs of loss, without objecting thereto, by investigating and making an offer of settlement, waives strict compliance with the terms of the policy. Kearney v. Security Ins. Co., 67 Pa. Super. Ct. 179. If investigation develops a ground for forfeiture, the insurer cannot, without waiving such defense, proceed thereafter as though the policy were valid,

and induce the insured to believe that it so regards the policy. Tero Petroff & Co. v. Equity F. Ins. Co., 183 Iowa 906, 167 N.W. 660. To the same effect, see Pasherstnik v. Continental Ins. Co., 67 Mont. 19, 214 Pac. 603 (1923); Travelers Fire Insurance Company v. Robertson, 103 Ga. App. 816, 120 S.E. 2d 657 (1961).

In McElroy v. John Hancock Mut. Life Ins. Co., 41 A. 112, 88 Md. 137, 71 Am. St. Rep. 400 (1898), the court aptly noted, finding a waiver of a ninety-day proof of death requirement:

> "It may be fairly said that the defendant negotiated with the plaintiff without making the defense now relied on. It is true, it subsequently relied upon this defense; but, when it wrote the letter of the 15th of February to him, it neither directly nor indirectly placed its refusal to pay upon want of proper proof of death."

A 1963 Maryland case reaffirms these principles. In Federal Mutual Insurance Co. v. Lewis, 231 Md. 587, 191 A. 2d 437, the court, in holding that waiver of proof of loss is a jury question, stated:

> "It is perfectly clear that a provision for proof of loss is for the benefit of the insurer and may be waived. An offer to pay is to a certain extent an admission of liability, at least in the amount offered, and hence may support an inference of waiver. Caledonian Fire Ins. Co. v. Traub, 86 Md. 86, 96, 37 A.782. Cf. Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 149, 38 A. 29. The question of waiver is ordinarily one for the jury, and an offer of settlement, as distinguished from an offer of compromise, is admissible to the extent that it admits liability in any amount. Pentz v. Penn. Fire Ins. Co., 92 Md. 444, 448, 48 A. 139. Other cases in point are Farmers' Fire Ins. Co. v. Baker, 94 Md. 545, 554, 51 A. 184; Bakhaus v. Caledonian Ins. Co., 112 Md. 676, 683, 77 A. 310 and Citizens Ins. Co., v. Conowingo Bridge Co., 113 Md. 430, 439, 77 A. 378. Cf. Empire State Ins. Co. v. Guerriero, 193 Md. 506, 520, 69 A. 2d 259. Other cases are collected in 49 A.L.R. 2d 87. See Also 17 Appleman, Insurance Law and Practice §§ 9847, 9856, and 7 Couch, Insurance, §§ 1560, 1577."

The record in the present case actually presents an estoppel situation, since it discloses that appellant expended effort and money in reliance upon appellee's course of action. However, it is not necessary to go so far as to find estoppel, as estoppel is not a necessary element of waiver:

> "There has never been a comprehensive and fully satisfactory definition of waiver, but it is safe to say that estoppel is not an essential element of waiver in Maryland and waiver may take place after the time for filing notice or proof of loss in insurance cases. McElroy v. John Hancock Life Ins. Co., 88 Md. 137, 149, 191, 41 A. 112; Fidelity & Casualty Co. v. Riley, 168 Md. 430, 438, 439, 178 A. 250, and cases therein cited." Eastover Stores, Inc. v. Minnix, 150 A. 2d 884, 891 (Ct. App. Md. 1959).

The above passage is quoted with approval in Hill v. Benevicz, 167 A. 2d 111, (Ct. App. Md. 1961) at 110.

Two fairly recent cases in this Court require attention, for the purpose of distinguishing them from the present case. In both those cases, it was held there was no waiver of the time element in proof of loss clauses. In Glenco Corp. v. American Equitable Assurance Co., 110 U.S. App. D.C. 158, 289 F. 2d 899 (1961), there was actual refusal to file a proof of loss and there were no settlement negotiations after the refusal. In Adelman v. St. Louis Fire and Marine Ins. Co., 110 U.S. App. D.C. 392, 293 F. 2d 869 (1961), cert. denied 368 U.S. 937, there was no course of settlement conduct as in the present case. The Court stated:

> "The Court finds there was no expression of any willingness on the part of defendant to proceed with the question of liability without securing written proof of loss or any representation or statement to the insured which might lead them to assume that the requirement might be dispensed with, or to make them delay compliance, nor were there any other statements or acts by the adjuster which could reasonably be construed to constitute a waiver of the requirement to file written proof of loss within the 60 days." 110 U.S. App. D.C. at 393.

CONCLUSION

For either of the alternative reasons above advanced, appellee waived the ninety day proof of loss provision of its insurance policy. It waived it at the outset by means of the Memorandum to which it, through its representative, was a signatory; and/or it waived through its subsequent course of conduct in which it ignored the question of timely filing and engaged in extensive settlement negotiations.

For reasons hereinabove advanced, appellant respectfully submits that the trial court's finding and judgment was clearly erroneous in that it was founded upon an incorrect assessment of the uncontradicted facts and was contrary to the substantive law. In order to correct this error, the judgment of the trial court should be reversed.

Respectfully submitted,

MILTON M. BURKE

1010 Vermont Avenue, N. W.
Washington, D. C.

Attorney for Appellant.

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[Filed August 3, 1960] JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ACE VAN & STORAGE CO., INC.
A CORPORATION
821 HOWARD ROAD S. E.
WASHINGTON, D. C.

Plaintiff

vs.

LIBERTY MUTUAL INSURANCE COMPANY
A CORPORATION
DUPONT CIRCLE BUILDING
1346 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C.

Defendant

Civil No. 2471-60

COMPLAINT

(To Recover Loss Under Policy of Insurance)

1. Jurisdiction is vested in this Court pursuant to the provisions of the Code of Laws for the District of Columbia the amount at issue being a sum in excess of three thousand dollars.

2. The plaintiff is a Delaware corporation with its principal place of business in the District of Columbia and which operates a moving and storage business and did operate such a business both in the District of Columbia and at Norfolk, Virginia during the whole of 1958 and 1959. From January 1958 through September of 1959, the plaintiff engaged one, Gaylord J. Hicks, as its manager of its Norfolk warehouse and operation. During the said period of time, 1958 and 1959, the plaintiff was secured

by a certain insurance policy written by the defendant, an insurance carrier, which policy was entitled "Crime Policy" was numbered C.H-03-27434, and secured the plaintiff against loss resulting from the dishonesty of any employee within the limits of ten thousand dollars ($10,000.00) for any one policy period and in addition thereto plaintiff was entitled under the said policy agreement to recover all reasonable expenses incurred incident to a dishonesty loss under certain conditions. The premium for this policy of insurance was fully paid by the plaintiff to the defendant for the 1958 and 1959 periods.

3. On or about the early part of October 1959 or the latter part of September of the same year, the plaintiff, through its officials, discovered that its employee, Gaylord J. Hicks, might be guilty of dishonest conduct with the plaintiff's funds and property which could amount into substantial sums. The defendant was immediately notified of this and requested to approve expenditure under the policy of reasonable sums for investigation and auditing, which request the defendant at first ignored and later rejected. While the policy of insurance provided for the payment of reasonable expenses if requested by the defendant, inasmuch as it was impossible to ascertain the extent of the loss, to prosecute the employee, and to sensibly prepare a proof of claim, the action of the defendant in rejecting the claim for expenses was unreasonable and the plaintiff believes that it is entitled to recover such reasonable expenses.

4. The plaintiff, upon the completion of its investigation, discovered that its total loss as a result of the dishonesty of the aforesaid employee amounted to a sum which was in excess of ten thousand dollars ($10,000.00) for each of the years 1958 and 1959 and the expenses incurred by it to investigate and audit the loss amounted to forty-one hundred and fifty-seven and 50/100 ($4,157.50) dollars.

Wherefore plaintiff prays for judgment against the defendant in the full sum of twenty-four thousand, one hundred and fifty-seven and 50/100 ($24,157.50) dollars together with costs.

/s/ Milton M. Burke
Attorney for Plaintiff.

* * *

[Filed August 24, 1960]

ANSWER TO COMPLAINT

First Defense

The complaint fails to state a claim upon which relief can be granted against this defendant.

Second Defense

1. Defendant admits that it issued Crime Policy No. CH-03-27434 to plaintiff and that that policy remained in effect until September 21, 1959. Defendant further admits that the plaintiff is a corporation engaged in the moving and storage business and that plaintiff operated both in the District of Columbia and at Norfolk, Virginia. Defendant further admits upon information and belief that plaintiff engaged one Gaylord J. Hicks as the manager of its Norfolk, Virginia operation.

2. Defendant is without knowledge or information which is sufficient to form a belief with respect to the truth of the allegations contained in the complaint concerning losses and damage and, therefore, demands strict proof thereof.

3. The insurance policy relied upon by plaintiff incorporates in writing all of the agreements between plaintiff and defendant and any contentions based thereon must be governed by the terms of the written contract of insurance. Defendant denies that plaintiff was entitled to recover sums under the policy relied upon either for losses sustained or

expenses incurred; defendant denies that plaintiff expended any sums pursuant to defendant's request as that term is used in Condition 7 of the policy relied upon; and further denies each and every other material allegation contained in the complaint which is not herein specifically answered.

Third Defense

Defendant denies that the applicable limit of the insurance contract relied upon is $10,000 for any one policy period. Endorsement Serial Number 3 expressly provides:

> (2) that, in any event, regardless of when any loss or losses shall be sustained under the prior policy or the superseded policy, or partly under both, the applicable limits of amount of liability assumed by the company under each for any loss or losses (a) caused by the acts or omissions of any one person or acts or omissions in which such person is concerned or implicated, or (b) in respect of any one casualty or event shall not be cumulative.

Additionally, Condition 2 provides:

> Regardless of the number of years this policy shall continue in force and of the number of premiums which shall be payable or paid, the limit of the company's liability with respect to each coverage, as specified in the policy, shall not be cumulative from year to year or period to period.

Additionally, Endorsement Serial Number 1 provides in pertinent part:

> The liability of the company shall not be cumulative regardless of the number of years and number of three-year periods the policy shall continue in force and the number of premiums which shall be payable or paid.

Fourth Defense

Plaintiff's claim in the instant action is barred for failure of plaintiff to comply with the conditions of the insurance contract relied upon. Specifically, Condition Number 7 provides:

> (b) file proof of loss with the company within one hundred twenty days after the discovery of loss or damage, unless such time is extended in writing by the company, in the form and manner required by the company.

Fifth Defense

The contract of insurance relied upon was not effective as to the employee, Gaylord J. Hicks, by reason of the fact that plaintiff had knowledge of fraudulent or dishonest acts of said employee. Condition Number 16 in pertinent part provides:

> Unless the company shall otherwise agree in writing, this policy shall not become effective as to any employee who, within the knowledge of the insured or any partner or officer thereof not in collusion with such employee, has committed any fraudulent or dishonest act in the service of the insured or otherwise.

Sixth Defense

The contract of insurance relied upon specifically excludes liability for:

> . . . loss or damage, unless verifiable records, books and accounts are regularly kept by the insured in such manner that the amount of loss or damage can be determined therefrom by the company; . . . "

Seventh Defense

The contract of insurance relied upon specifically excludes under Coverage A losses " . . . proof of which, either as to its factual existence or as to its amount, is dependent upon an inventory computation or a profit and loss computation."

Eighth Defense

The damages and losses complained of were the result, in whole or in part, of the carelessness and negligence of the plaintiff in the manner in which it trained and supervised its employees and in the manner in which it conducted its business operations.

HOGAN & HARTSON

By /s/John P. Arness

John P. Arness
Attorneys for Defendant

* * *

[Certificate of Service]

[Filed October 16, 1961]

PREHEARING ORDER

Action for Money Due Under "Crime" Insurance Policy UNDISPUTED FACTS:

Defendant, Liberty Mutual Insurance Co., a corporation, issued a crime policy of insurance, No. Ch-03-27434, to P, Ace Van & Storage Co., Inc., a corporation, effective Sept. 21, 1956. Said policy remained in effect until at least Sept. 1959. Under Coverage A of said policy D agreed to pay for "loss, including loss of property, due to any dishonest or fraudulent act committed anywhere by any of the employees, whether acting alone or in collusion with others, whether or not the insured is able to designate the persons causing the loss."

Said policy provided a limit of liability in the amount of $10,000 as to Coverage A.

Said policy provided further:

"That, in any event, regardless of when any loss or losses shall be sustained under the Prior Policy or the Superseding Policy, or partly under both, the applicable limits of amount of liability assumed by the company under each for any loss or losses

(a) caused by the acts or omissions of any one person or acts or omissions in which such person is concerned or implicated, or (b) in respect of any one casualty or event shall not be cumulative."

Said policy further provided under EXCLUSIONS,

"(a) to loss or damage, unless verifiable records, books and accounts are regularly kept by the insured in such manner that the amount of loss or damage can be determined therefrom by the company".

Section 7 of CONDITIONS provided for written notice by the insured to the company upon discovery of any loss and filing of proof of loss with the company within 90 days after such discovery, unless such time be extended in writing by the company, as more specifically set forth in the policy.

Said Section 7 further provided:

". . . The Company shall in addition to the applicable limit of liability of this policy, reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's written request."

A formal proof of loss (D's PT Exhibit No. 1) notarized Feb. 1, 1960 was filed with D's company by P. Said proof of loss claimed a net loss of $15,252.62, through the acts of one Gaylord J. Hicks, P's mgr. at Norfolk, Virginia.

No amount has ever been paid by D to P on account of the alleged loss.

PLAINTIFF contends that during the period from Feb. 1958 thru Sept., 1959, during which time D's policy was in effect, Gaylord Hicks, then employed as manager of P's Virginia office, embezzled, misappropriated, and in other dishonest and fraudulent ways caused loss to P of

monies in a total sum in excess of $37,010.12, as set forth in Exhibit C attached hereto and made a part hereof, entitled "Statement of Special Damages and Losses". P asserts that it gave due notice of the loss and complied with all policy provisions.

P contends that the maximum permissible coverage by said policy under Coverage A for the period of 2 years is $20,000, plus the expenses of investigation and assembling of material leading to the prosecution of the offender and to ascertainment of the amount of P's loss, which said expenses were in the amount of $4,157.50.

P asks judgment against D in the amount of $24,157.50 together with costs.

DEFENDANT denies any liability to P under the provisions of said policy on account of the claimed losses.

D asserts that P failed to comply with condition No. 7 of the policy, a prerequisite to recovery thereunder, in that P failed to file a proof of loss with D in the form and manner prescribed by the policy within 90 days after the discovery of the loss or damage and D did not extend the time for filing a proof of loss.

D contends further that the alleged loss was within subparagraph A of EXCLUSIONS, in that D's auditor could not determine the amount of the loss from verifiable records, books and accounts regularly kept by insured.

D further contends that certain of the claimed damages and losses as itemized in P's exhibit C were excluded from coverage under Coverage A as losses " . . . proof of which, either as to its factual existence or as to its amount, is dependent upon an inventory computation or a profit and loss computation." (See stipulations as to furnishing specific reference to quoted clause in policy or Riders and also specification of particular items claimed to be within this exclusion.)

D asserts further that even if it be held liable for any of the alleged losses the maximum coverage of the policy is $10,000, as limited

by Endorsement Serial No. 1 and 3 and Condition 2 of the policy.

D denies that there is any coverage under the policy for expenses incurred in preparing a proof of loss to be submitted to this defendant in support of a claim under the policy, and denies that plaintiff expended any sums pursuant to this defendant's written request as that term is used in Condition 7 of the policy relied upon.

D further asserts that the policy was a 3-year policy effective from Sept. 21, 1956 to Sept. 21, 1959.

STIPULATIONS:

Facts under "UNDISPUTED FACTS".

It is stipulated that the following may be admitted without formal proof of authenticity, subject to all other objections:

P's Pretrial Exhibits:

No. 1 — Crime policy (Schedule Broad Form)

No. 2 — Crime policy declaration

2a — (except that D states that No. 2 is incomplete)

No. 3 — Change of facsimile figure.

No. 4 — 3-year premium endorsement

No. 5 — Superseded suretyship endorsement

No. 6 — General Change Endorsement

No. 7 — Memorandum of conference — Oct. 9, 1959 (D's carbon copy)

D's Pretrial Exhibits:

No. 1 — Proof of Loss Form

Any other documents initialed by both counsel prior to trial.

No stipulation is made with reference to the following: D's No. 2, 3 and 4.

P's No. 8 and 9.

Counsel for P has requested a copy of the summary which he believes to have been prepared by D's auditor as to disputed items

included in P's claim some time ago. Counsel for D does not agree to furnish a copy of the requested information, on the ground of the attorney-client privilege, but asserts that 30 days after completion of an audit of P's books which D contemplates making in the near future, D will furnish P a statement as to disputed portions of P's claim, assuming there be any liability under the policy.

In view of the fact that the trial of this case will involve introduction of a great mass of underlying documents, and the further fact that it is contemplated that an amicable settlement may be reached after D's further audit of P's books, all evidentiary material has not been produced at pretrial. Counsel agree, if a trial is to be had, to get together prior thereto in an endeavor to reach some stipulation with respect to admission of summaries or categories of evidence with a view to expediting the introduction of accounting material and other documents.

As to D's request that it be supplied the last known address of Gaylord J. Hicks, P states that his whereabouts are unknown.

Counsel agree to exchange, within 30 days, the names and addresses of all witnesses known to them, including experts, if any, filing a copy with the Clerk of the Court and if they learn of any additional witnesses prior to trial will exchange the names and addresses promptly.

Trial attorneys: For Plaintiff — Milton M. Burke

For Defendant- John P. Arness

NO TRIAL TO BE HAD BEFORE Dec. 1, 1961

/s/Elizabeth Bunten
Asst. Pretrial Examiner

Attorneys

_____ For Plaintiff

_____ For Defendant

1 EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D. C.

Thursday, June 6, 1963

The above-entitled matter came on for hearing before the HONORABLE EDWARD A. TAMM, United States District Judge, at 10:45 a.m.

* * * * *

EXCERPTS OF PROCEEDINGS

3 * * * * *

Whereupon,

ARTHUR E. MORRISSETTE

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BURKE:

Q. Mr. Morrissette, would you state your name, please? A. Arthur E. Morrissette.

Q. Where do you live, Mr. Morrissette? A. 1600 South Joyce Street, Arlington, Virginia.

Q. Where are you employed? A. Ace Van & Storage Company, Incorporated.

Q. In what capacity? A. President.

Q. What other work do you do there in that capacity? A. General Manager.

Q. Mr. Morrissette, I direct your attention to 1958, '59, '60, '61 to this date, were you serving in that capacity during this entire period of time? A. I was.

Q. Mr. Morrissette, would you tell the Court the type of business
4 that Ace Van & Storage Company operates? A. It's a moving and storage company, hauling furniture within and between states. It also stores furniture in Washington, D. C. and in Norfolk, Virginia.

4 Now, during the period mentioned, Mr. Morrissette, approximately how many vehicles did your company operate? A. Twenty.

Q. Can you give us approximately the size of your local warehouse? A. The Washington, D. C. warehouse has a total of 40,000 square feet.

Q. Is that considered, sir, one of the larger companies in this area or medium or smaller companies? A. It is among the larger.

Q. In your capacity in that business, do you do any business with the United States Government and branches of the United States Government? A. A large percentage of our business.

Q. Now, Mr. Morrissette, are you regulated under the Interstate Commerce Act? A. We are.

Q. In connection with your operation as an ICC carrier, Mr. Morrissette, in what manner are your books and records kept? A. In accordance with prescribed procedures of the Commission.

5 Q. During the period of time from 1958 to this date and prior to that date, what supervision did your books, records and accounts have in addition to the personnel of your office? A. We had an outside certified public accounting firm and, of course, the annual review by the Commission.

Q. In connection with your dealings with the United States Government and the Interstate Commerce Commission, are you required to keep accurate and exact records of all your transactions? A. Yes.

Q. Now then, Mr. Morrissette, does your company also have a warehouse or office in Norfolk, Virginia, or did it have during the critical period? A. Yes.

Q. Can you tell us where that is located? A. 2516 Ingleside Road, Norfolk, Virginia.

Q. How old a building is that? A. It was constructed in 1958.

Q. And about what capacity is that building? A. Ten thousand square feet.

5 Q. Now, Mr. Morrissette, where is the principal office of your company? A. Washington, D. C.

6 Q. At what address? A. 821 Howard Road, Southeast.

Q. Now then, did there come a time, sir, when you were required to engage a manager to operate your Virginia office and your Virginia warehouse? A. There did.

Q. Did there come a time, sir, when your company engaged one whose name was Gaylord C. Hicks? A. Yes.

Q. When was that? A. During January of 1958.

Q. Can you tell the Court exactly what were the duties of Mr. Hicks in his capacity of manager of the Virginia office? A. He was responsible for the taking of orders for work, hiring personnel, dispatching personnel, maintaining the fleet, managing the warehouse. He had responsibility for management of that office under our direction from Washington.

Q. Did he have any authorization to pay any bills? A. No authority to pay bills.

Q. Will you tell the Court in what manner the payment of bills of the Virginia office was handled? A. He was required to submit to Washington certified bills from which payment for same would be forwarded from the Washington office.

7 Q. Did money come into the Norfolk office for payments on account or for shipments or deliveries made in the Norfolk area? A. Yes.

Q. And how was that money to be handled? A. It was to have been deposited to the account of the Ace Van & Storage Company, Incorporated.

Q. Was there any provision or authorization for the disbursement of any of those funds coming into the Virginia office by Mr. Hicks?
A. None whatsoever.

Q. Now then, Mr. Morrissette, in connection with any shipments or orders for shipments that came into the Virginia office, in what manner were they handled from a bookkeeping point of view? A. All bookkeeping

was done in Washington, D. C.

Q. I don't think I made myself clear. Were there any warehouse receipts or shipping orders that were handled through the Norfolk office? A. Yes.

Q. And how were they set up? Who supplied those warehouse receipts? A. Our office supplied the Norfolk office with all stationery and forms.

8 Q. And how many copies of each order or shipment was required to be filled out at the time that an order was taken or recorded? A. Depending on the nature of the transaction, there were requirements for each individual character of transaction:

For an interstate move, an order for service in duplicate was required. One was retained by his office and the other forwarded immediately to our office for dispatch.

In the case of local moving, prenumbered consecutively numbered invoices in duplicate were supplied his office and they were to have been filled out and used for each transaction. The original, after having the funds collected, was to have been forwarded to Washington together with the deposit slip indicating that it had been deposited; the duplicate was given to the customer as his receipt.

In the case of storage, a warehouse receipt form made in triplicate, one copy retained in the office at Norfolk, one given to the depositor and one forwarded to Washington and with any deposit of money having been recorded and placed in the bank.

Q. Now, were these books of orders or shipping orders or warehouse receipts, were they numbered? A. Yes.

9 Q. And was there any record of those numbers kept in your main office? A. Yes, sir.

Q. Would there have to be, then, an accounting to you or to your main office of all the orders or all the books that had been delivered to

the Virginia office and all the books that had not been returned? A. Yes.

Q. Would there be any way of misleading your office by imprinting different types of books? A. We found that our manager had his own supply of forms printed, duplicating our entire order blanks and including the prenumbered consecutive number arrangement that we had.

Q. Now, Mr. Morrissette, getting away from that for the moment, did there come a time then when your company purchased from the defendant an insurance policy securing you against the dishonesty of your employees? A. Yes.

MR. BURKE: Your Honor, these have been marked at pretrial. I presume we should re-mark them at this time.

THE COURT: The clerk will mark the exhibits.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 1, for identification.

(Insurance policy was marked Plaintiff's Exhibit No. 1, for identification.)

(Opposing counsel viewed exhibit.)

MR. ARNESS: Your Honor, with the reservation that these endorsements may not be entirely complete, we have no objection.

THE COURT: The exhibit will be admitted. Do you want the witness to identify it?

MR. BURKE: Yes, Your Honor.

BY MR. BURKE:

Q. Now, Mr. Morrissette, I show you Plaintiff's Exhibit No. 1 and I ask you if that is the insurance policy which you purchased from the defendant company, entitled a Crime Policy? A. Yes, it is.

Q. Mr. Morrissette, did your company pay the premiums for this policy of insurance? A. Yes, we did.

MR. BURKE: I offer the policy in evidence, Your Honor.

THE COURT: It will be admitted. Will you give it to the Clerk.

(Plaintiff's Exhibit No. 1 for identification was received into evidence.)

11 MR. BURKE: I may want to refer to it.

THE COURT: Go ahead.

BY MR. BURKE:

Q. Now, Mr. Morrissette, I think you testified that Mr. Hicks was employed by you sometime during the early part of 1959 or 1958? A. Yes.

Q. Did there come a time, Mr. Morrissette, when you discovered that there was something suspicious going on in the Norfolk office? A. Yes, sir.

Q. Can you tell us approximately when this was? A. During the latter part of September, 1959, while casually leafing through a bank statement with its cancelled checks, it became apparent to me that the same penmanship was used for the endorsement of the major portion of the checks even though they were made out to other employees.

Q. What, if anything, did you do then? A. It caused me to have suspicion that something might be wrong and so I began checking our payroll records and the Norfolk transactions a little closer; and during the course of my investigation, it was necessary for me to consult with others in the office. Then, curiously enough in the midst of my investigation — and I recall the
12 moment precisely because it was just as the first ball was being pitched in the World Series of that year — on Sunday afternoon, I got a call from Mr. Hicks calling from Norfolk at my home, in apparently an upset condition, and stated that he wanted to talk to me as soon as possible.

I asked him what was the matter and he said things were in an awful —

MR. ARNESS: I object, Your Honor, to what was said.

THE COURT: I believe this is hearsay.

MR. ARNESS: Excuse me. May I add, Your Honor, the witness in an unresponsive manner testified as to characterization of penmanship. Unless he is qualified as an expert, I would like to move to strike that testimony.

THE COURT: The motion is denied.

Go ahead.

BY MR. BURKE:

Q. Now, Mr. Morrissette, don't tell us of your conversation with Mr. Hicks. Tell us what if anything you did as a result of that conversation. A. He asked me to come to Norfolk and I said that I would consider it and—

THE COURT: Just answer the question. What did you do?

13 THE WITNESS: Then I said I would call him back.

BY MR. BURKE:

Q. Then what happened? A. Then I called my accountant, with whom I had already discussed the matter.

Q. Who was that? A. Mr. David M. Gruber. He and I decided between us that it would be best to invite Hicks to come to Washington, so I called him back immediately and instructed him to come to Washington.

Q. This was on a Sunday? A. On Sunday—to come to Washington on Monday as early as possible, using our conveyance which was provided for him.

Q. Did he come to Washington the next day? A. He did.

Q. At what time of the day was that? A. Approximately noon.

Q. Where did he meet with you? A. At the office of David M. Gruber Company.

Q. What if anything took place at that conference? A. He—I will have to say what he said.

MR. ARNESS: I object to what he said.

14 MR. BURKE: Your Honor, I think that is pertinent to the issue before this Court.

THE COURT: It is not a question of pertinency. How do you overcome the hearsay rule? You know what it is.

MR. BURKE: Well, Your Honor, this is an admission by an employee as to certain things that he had done. This isn't hearsay; this is actually part of the res gestae.

THE COURT: This isn't hearsay? You are going to produce this witness so that he can be cross-examined as to whether he made these statements?

MR. BURKE: Your Honor, this witness, nobody knows where he is.

THE COURT: Very well. The Court has ruled that this is hearsay. Any statements made by Hicks are obviously hearsay.

BY MR. BURKE:

Q. Mr. Morrissette, Mr. Hicks came to Washington and you and he and Mr. Gruber met at Mr. Gruber's office; was that your testimony, sir? A. Yes.

Q. As a result of that meeting, what if anything further did you do? A. We told him to go back to Norfolk and try to get some things together
15 for us that we had asked for; and then we called Liberty Mutual Insurance Company, who was the company that bonded our personnel.

Q. Was that on that same date, sir? A. On the same day, within the hour. We then had a conference with a representative from Liberty Mutual at the office of David M. Gruber and Company.

Q. Do you recall of your own memory the date of that conference? A. I think it was October 10. It was the day after the Sunday.

THE COURT: Just a minute. Read me the witness' previous statement, please.

(The record was read by the reporter.)

THE COURT: Very well. Go ahead.

BY MR. BURKE:

Q. Who was present at this conference? A. David M. Gruber, Milton Burke and myself with the Liberty Mutual representative, of course.

Q. And who was the Liberty Mutural Representative? A. Mr. Grier.

Q. Now, Mr. Morrissette, can you tell us approximately how long that conference lasted? A. Between an hour and two hours.

16 Q. What if anything was discussed at that conference with regard to the time that would be required to fully investigate this loss and to ascertain the extent of it? A. It was mutually agreed upon by all parties

at the conference that we had a very complicated embezzlement and that it was going to involve considerable time and effort to gather the facts and figures that would satisfy the requirements of the policy.

Q. Was there any discussion at that conference with Mr. Grier, representing the defendant company, regarding a prosecution of the employee in question? A. Yes.

Q. And as a result of that, was any arrangement made for you to meet with any representative of the defendant company in Norfolk, Virginia? A. Yes.

Q. Now, Mr. Morrissette, do you know whether or not a memo was prepared at that conference, setting forth generally the sum and total of the matters which took place at the conference and the conclusions which were arrived at? A. There was a memo prepared at the time.

Q. Do you know whether Mr. Grier, representative of the defendant company, signed such a memo? A. He did.

17 MR. BURKE: Would you mark this as the Plaintiff's next exhibit, please?

THE DEPUTY CLERK: Plaintiff's Exhibit No. 2 for identification.

(Document was marked Plaintiff's Exhibit No. 2, for identification.)

(Opposing counsel viewed exhibit.)

BY MR. BURKE:

Q. Mr. Morrissette, I show you Plaintiff's Exhibit No. 2 and ask you, sir, whether that is the memo that was prepared by Mr. Gruber's office at the time of the conclusion of that conference? A. (Perusing exhibit) This is a copy of the memo.

Q. Now, Mr. Morrissette, on page 1 of this memo, there are two or three pencil inserts and one on page 2 and I ask you, sir, whether these inserts were made or the corrections made at the time that this document was read and executed? A. These corrections were made after the typist had finished it.

Q. Because of the typist's errors? A. Yes, sir.

Q. I direct your attention to paragraph 3 of this memo — Strike that. I withdraw that for the moment. There are two signatures on this Plaintiff's No. 2. Can you tell the Court whose signatures they are?

18 A. Arthur E. Morrissette and Frederick A. Grier.

Q. There is a card attached to the first page of this memo with the name Liberty Mutual Insurance Company on it and Frederick Grier's name on it. Where was that card obtained? A. Mr. Grier gave it to me.

Q. Was this on the occasion of his meeting with you? A. Yes.

Q. Now then, did you see Mr. Grier sign that document? A. Yes, I did.

Q. Now then, directing your attention to paragraph 3 of this document, would you read that to us? A. "The representative of Ace Van & Storage Company, Incorporated and of Liberty Mutual Insurance Company will continue the investigation to as prompt a disposition of this matter as is reasonably possible."

Q. Now, Mr. Morrissette, can you tell us what led to the inclusion of that paragraph in this document?

MR. ARNESS: I object to that, Your Honor. The document speaks for itself.

THE COURT: I will overrule the objection.

Answer the question.

19 THE WITNESS: We recognized that there had been a loss but we were certainly not in a position at that time to establish precisely the extent of the loss.

BY MR. BURKE:

Q. Was there any conversation as to the amount of time it would take to ascertain the extent of this loss?

THE COURT: The witness said that it was agreed it would require considerable time.

MR. BURKE: Your Honor, what I was referring to is the preliminary conversation which was much more elaborate than the mere wording of this document.

BY MR. BURKE:

Q. Do you understand my question, Mr. Morrissette? A. During our conference, it was explained to all present that in order to gather the supporting documents, it would be necessary to correspond with associated carriers, interstate carriers throughout the country, as well as an exhaustive study of our own records in both Washington and Norfolk.

Q. And was that the reason, then, for the inclusion of paragraph 3? A. Yes.

MR. BURKE: I would like to offer Plaintiff's No. 2, Your Honor.

20 MR. ARNESS: No objection.

THE COURT: The exhibit will be admitted.

(Plaintiff's Exhibit No. 2 for identification was admitted into evidence.)

BY MR. BURKE:

Q. Now, Mr. Morrissette — A. May I add one more point, please?

THE COURT: No. Just answer the questions.

BY MR. BURKE:

Q. Mr. Morrissette, during your conversation with Mr. Grier at this conference, which was attended by myself, Mr. Gruber, Mr. Grier and yourself, was there any discussion as to the expenditures which would be incurred in connection with the investigation of this loss? A. Yes.

Q. Will you tell us the nature and extent of that conversation? A. It was recognized by all present that it would involve considerable expense in mailing. Most of our inquiries, of course, had to be by certified mail to be assured of the authenticity of the reply. There was going to be considerable traveling and telephone expenses as well as an auditing expense by professional assistance and it was agreed that the policy, since

it required this justification, had the flexibility in it to defray those expenses.

21 Q. Was any representation made to you by Mr. Grier regarding the cooperation of the Liberty Mutual Insurance Company in this investigation? A. I am sorry, I did not understand the question.

Q. I say, was any representation made to you by Mr. Grier at this meeting regarding the willingness of the Liberty Mutual Insurance Company to cooperate in the investigation and to help in the investigation? A. He indicated that they were quite willing to work with us. It was quite obvious to him that there had been an embezzlement and—

MR. ARNESS: Objection, Your Honor.

THE COURT: I assume this is hearsay.

MR. ARNESS: I object on two grounds: First of all, what Mr. Morrissette is about to say now is not responsive to the question. He started to say it appeared to Mr. Grier. I don't think that is competent.

Secondly, any testimony with reference to oral representations are immaterial in view of the fact that the policy which has been introduced in evidence requires written requests on the part of the company before any expenses are recoverable.

22 THE COURT: The Court will hear this testimony of anything said by Grier. You may argue as to its effect in evidence at an appropriate time.

Go ahead.

MR. BURKE: Will you repeat the question, please?

(The pending question was read by the reporter, as follows: Was any representation made to you by Mr. Grier at this meeting regarding the willingness of the Liberty Mutual Insurance Company to cooperate in the investigation and to help in the investigation?)

THE WITNESS: Mr. Grier recognized that there had been a loss—

THE COURT: No. What did he say, not what he recognized? What did he say?

THE WITNESS: He said that for us to go ahead and make the investigation and that he would do what he could to defray the expenses.

BY MR. BURKE:

Q. In connection with this, Mr. Morrissette, was there any arrangement made by Mr. Grier at that time or was there any statement made by him that he would make such an arrangement for their Norfolk representative to meet with you in Norfolk and to proceed further with the investigation? A. Yes, he did.

23 Q. As a result of this conference and these representations, did you then make a trip to Norfolk, Virginia? A. I did.

Q. How soon was that after this conference? A. Friday afternoon, or three days later.

Q. During the interim, were any arrangements or preparations made? A. Mr. Grier arranged for a representative of the local branch of Liberty Mutual Insurance Company to meet me at our Norfolk office.

Q. And did you go to your Norfolk office? A. I did.

Q. Who from your office went with you? A. My sons and my wife.

Q. Which sons were they? A. Arthur E., Jr., Donald J. and Kenneth.

Q. Did you meet with the representative of the District Mutual Insurance Company in your Norfolk office? A. I did.

Q. When was that with regard to the time of the day? A. Approximately 10:30 in the morning.

Q. Did you first have a preliminary meeting— A. Excuse me. We arrived on Friday afternoon. We met with the representative at 10:30 on Saturday morning.

24 Q. Did you talk with this representative before you had a meeting with Mr. Hicks? A. No, it was all together with Hicks and he and I.

Q. Was this representative fully informed of the preliminary circumstances? A. Yes. Apparently, he had been told everything by Mr. Grier.

Q. Now then, did you then have a conference with Mr. Hicks?

A. And Mr. Grier.

Q. With Mr. Hicks and Mr.— A. Yes.

Q. Not Mr. Grier; this other gentleman, wasn't it? A. Excuse me. The representative of the Liberty Mutual Company, the name of whom I can't recall, and Mr. Hicks and I.

Q. Now, was there a statement made by Mr. Hicks at that time to this gentleman? A. Yes.

Q. Did they give you a copy of that statement? A. No.

MR. BURKE: Mr. Arness, do you have that statement?

Your Honor, if Your Honor please, I asked Mr. Arness — Mr. Arness told me that he would have that statement here in court today, together
25 with one other document, and I told him that I wanted to know that because I wanted to ask for its introduction here today.

THE COURT: You are requesting it of Mr. Arness at this time, are you?

MR. BURKE: Yes, Your Honor.

THE COURT: Very well.

MR. ARNESS: Your Honor, I have a copy of a signed statement from Mr. Hicks that was obtained at some time during the course of the investigation. It's dated October 10, 1959 and it is, apparently, signed by Mr. Hicks.

I took the position with Mr. Burke earlier and I take it now before Your Honor that such a statement is not admissible in evidence and that it is not relevant. And I say, therefore, there are no circumstances under which it could be relevant.

THE COURT: Why do you say it is not relevant?

MR. ARNESS: Well, it is not relevant because it couldn't possibly constitute competent evidence. It's an unsworn, uncross-examined statement of a person who is, apparently, not going to be called as a witness

in the case. It is just a signed statement. I have a photostatic copy of it. I don't see any circumstances under which such a document could ever
26 become evidence in a court proceeding. It is a document that comes from an ex-employee of the plaintiff. I have no reservations about showing this document but I think it is not admissible and I, therefore, object.

THE COURT: I think in order to have a complete record, the Court will direct you to turn a facsimile copy, or whatever you have, over to counsel for the plaintiff who will have the clerk number the exhibit.

(Counsel complied.)

THE DEPUTY CLERK: Plaintiff's Exhibit No. 3.

(Document was marked Plaintiff's Exhibit No. 3, for identification.)

MR. BURKE: Your Honor, since this is the first time that I have had occasion to look at this, I wonder if Your Honor would indulge me a few moments so that I can read it?

THE COURT: Certainly.

(Short pause in proceedings.)

MR. ARNESS: Your Honor, might I have Your Honor's indulgence to read the statement? I have read it in the past but not recently and I would like a moment to scan it.

THE COURT: Very well.

(Short pause in proceedings.)

MR. ARNESS: Thank you, Your Honor.

27 BY MR. BURKE:

Q. Now, Mr. Morrissette, I show you Plaintiff's Exhibit No. 3 and I ask you, sir, whether you have ever seen that or the original of that document before? A. I saw this representative preparing a memorandum such as this while he was in the process of discussing the matter with Mr. Hicks.

Q. Did Mr. Hicks make any statements in your presence and in the presence of the representative of the insurance company? A. Yes, he

made all of the statements in our presence.

Q. During those statements, sir, did he make any admissions as to having taken any —

MR. ARNESS: I object, Your Honor.

MR. BURKE: Let me finish the question.

BY MR. BURKE:

Q. Did he make any statement as to having misappropriated any of the funds of Ace Van & Storage Company?

MR. ARNESS: I object, Your Honor.

THE COURT: State the ground for your objection.

MR. ARNESS: It would be hearsay, Your Honor. It is not admissible against the defendant.

THE COURT: The objection is sustained.

MR. BURKE: May I make an observation on that point, Your Honor?

28 This statement was made in the presence of both the insurance company representative and Mr. Morrissette regarding the loss itself.

THE COURT: That is correct.

Ask your next question.

MR. BURKE: Your Honor, that would constitute evidence —

THE COURT: Don't argue with the Court. The Court has ruled on this matter.

MR. BURKE: I would like to offer Plaintiff's Exhibit No. 3, Your Honor.

THE COURT: The Court will sustain the objection insofar as the document contains statements as to factual situations. The Court recognizes that the document may have some probative value as to whether notice was given to the defendant. You may reserve your right to re-tender it for that purpose if it becomes pertinent.

MR. ARNESS: Your Honor, because I have an interest in a full trial, with the understanding that I do not waive any objection to any oral testimony or any attempt to go beyond this instrument with reference to

hearsay or admissions on the part of Hicks, I am willing to stipulate that this written statement, even though it is not technically admissible, be received by Your Honor so that you will have a full picture of what was done.

29 THE COURT: Very well. The Court will admit the document on that basis then.

(Plaintiff's Exhibit No. 3 for identification was admitted into evidence.)

BY MR. BURKE:

Q. Now, Mr. Morrissette, after that one meeting with the representative of the defendant company and Mr. Hicks, were there any other subsequent trips that you and members of your staff made to Norfolk, Virginia in the course of this investigation? A. It was necessary for me to make several trips to Norfolk.

Q. In connection with your investigation, what sources did you and your staff have to go to in order to ascertain facts and figures? A. We went to customers who had paid their invoices but for which we had not received the money in the Washington office.

It was necessary to go to creditors of our company from whom Hicks had purchased—

MR. ARNESS: Your Honor, I object to this testimony on the ground that in answering the question, Mr. Morrissette is stating what other

30 people told him when he would go to see them. This is clearly hearsay. He is going beyond what he did.

THE COURT: The Court will not consider hearsay as competent testimony in the case. There is no jury present. The Court will not consider any testimony that is hearsay.

Go ahead.

MR. BURKE: I might say, Your Honor, that the only purpose of these questions is to show the extent and the time consumption of this investigation.

THE COURT: Go ahead.

BY MR. BURKE:

Q. Mr. Morrissette, would you continue, sir? A. It was necessary for me to visit with creditors of our firm from whom Mr. Hicks had purchased many items that were not needed by our firm and were used by him for his own personal benefit.

It was necessary to go to the Government agencies in the Norfolk area to ascertain which jobs had been awarded our company and to verify the dates upon which they paid for these services that were rendered by our company.

Then it was necessary to go to the bank to verify the fact that he had taken our Government checks and endorsed them and cashed them for his own benefit.

31 It was necessary to interrogate all of our employees, some who were still with our firm and some who had been separated for various reasons, to ascertain the extent to which they had performed for which we had paid them a salary but Mr. Hicks had taken the proceeds of such work that they had performed.

Q. Mr. Morrissette, how far is Norfolk from the District of Columbia? A. Two hundred and seven miles.

Q. Where did you then live? A. In Washington, D. C.

Q. And what form of motivation did you use in going to and from Norfolk on these occasions? A. I went by air and by car.

Q. Immediately after your meeting in Norfolk with a representative of the insurance company, what if anything did you do to Mr. Hicks? A. I found that even during the three days interim between—

MR. ARNESS: I object, Your Honor.

THE COURT: Your objection is sustained. Just answer the questions.

What is your question to the witness?

32 BY MR. BURKE:

Q. What did you do to Mr. Hicks? A. I had him arrested.

Q. Did you sever his employment with your company? A. I did.

Q. Now, in connection with the arrest of Mr. Hicks, was there any objection raised by this gentleman from the defendant company? A. No.

Q. Was there any approval given by him?

MR. ARNESS: I object to that as being irrelevant, Your Honor.

THE COURT: What is the relevancy?

MR. BURKE: The question, Your Honor, of the memo and their representation of cooperation; that every step we had taken was taken with their knowledge and their consent. This wasn't something that we kept them in the dark on; everything we did, we did with their full knowledge.

THE COURT: Very well. Answer the question.

THE WITNESS: Yes.

BY MR. BURKE:

Q. Mr. Morrissette, approximately how many incidences of defalcation did your investigation reveal?

33 MR. ARNESS: I object to that, Your Honor, as hearsay. He is asking him how many instances he heard about.

THE COURT: I believe your questions should be worded so that the matter will relate to testimony within the witness' personal knowledge.

MR. BURKE: I will rephrase that, Your Honor.

THE COURT: Very well.

BY MR. BURKE:

Q. Mr. Morrissette, in the course of your investigation, were there a series of incidents revealed which were documented and which were audited by your auditor? A. Yes.

Q. And from among these incidences, how many were used in the prosecution of Mr. Hicks in Norfolk, Virginia?

MR. ARNESS: I object to that, Your Honor.

THE COURT: The objection is sustained.

BY MR. BURKE:

Q. During the course of your investigation, Mr. Morrissette, what if any work was performed by your office in the District of Columbia to prepare the record for presentation to the insurance company? A. We had several of our employees work many hours each over a period of two or three months and each day, something new would develop.

34 Q. Did it become necessary in the course of your investigation to engage any accountants at Norfolk, Virginia? A. It was necessary.

Q. And did you engage any? A. I did.

Q. Whom did you engage? A. I can't recall the name from memory, but it's in the records.

THE COURT: We will recess at this time for the luncheon period, gentlemen.

(Whereupon, at 12:30 p.m., the trial in the above matter was recessed until 1:45 p.m. the same day.)

35 AFTERNOON SESSION 1:45 P.M.

Whereupon,

ARTHUR E. MORRISSETTE

the witness on the stand at adjournment, resumed the witness stand, was examined and testified further as follows:

DIRECT EXAMINATION (Continued)

THE COURT: Will you read the last question and answer, Madam Reporter.

(The record was read by the reporter.)

BY MR. BURKE:

Q. Mr. Morrissette, what was the purpose for engaging this accountant in Norfolk at that time? A. The City Attorney there needed some professional information to present to the Court in prosecution of Hicks.

Q. And to what was the audit or work of the accountant directed? A. There were some Government checks that were made to our corporation that Hicks had endorsed and cashed.

MR. ARNESS: I want to object on two grounds, Your Honor. First of all, that obviously is an answer giving hearsay; secondly, Government checks are not a part of this complaint and are not proper evidence in this case.

THE COURT: The objection is overruled.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 4.

36 (Document was marked Plaintiff's Exhibit No. 4, for identification.)

(Document was shown to opposing counsel.)

BY MR. BURKE:

Q. I show you Plaintiff's Exhibit No. 4, Mr. Morrissette, and ask you whether that helps you to remember the name of the accountant whom you engaged in Norfolk? A. Yes, it does.

Q. And the report which is designated as Exhibit No. 4 of this accountant, was that the report that was obtained at the request of the City prosecutor? A. It was.

Q. Now, Mr. Morrissette, how much did you pay to this firm of accountants for the work that they did in the preparation of this report?

MR. ARNESS: I object, Your Honor. That is not relevant. The work he did for the City prosecutor has no relevancy in this case and the expense incurred in connection with cooperating with the City attorney in Norfolk certainly also should not be proper evidence in this case.

MR. BURKE: Your Honor, we were told, as Mr. Morrissette testified, that they would cooperate; that they would have no objection to our going ahead and prosecuting this man and we were following the plan apparently laid down by them for us to proceed.

37 We went down there and fired this man. We called in the police. The police, naturally, needed cooperation for prosecution. In order to prosecute and in order to get further information from this man, this audit had to be made. This is all part of our expenses. This is part of that $4,157.00 which we claim.

THE COURT: I don't know that this is within the frames of the policy. I have not read the policy as yet. I will overrule the objection at this time.

Read the question, Madam Reporter.

(The pending question was read by the reporter.)

THE WITNESS: My recollection is it was about $900 or $950.

BY MR. BURKE:

Q. Mr. Morrissette, had you sometime ago prepared a schedule regarding the expenses that your company incurred in connection with the investigation in Norfolk? A. Yes, in 1960.

Q. I show you this and ask you whether you have prepared that? A. (Perusing document) Yes.

Q. Now, directing your attention to that exhibit, sir, I ask you
38 whether the amount which you paid to the accountant is recorded there?
A. Yes.

Q. How much was that? A. Eight hundred and twenty-five dollars.

MR. BURKE: I would like to offer Exhibit No. 4, if Your Honor please.

MR. ARNESS: I object to that, Your Honor. Obviously, the accountant who prepared it is not here to be cross-examined as to the truthfulness of it.

MR. BURKE: I merely offer it—

THE COURT: Just a minute. Mark the exhibit, Mr. Clerk.

THE DEPUTY CLERK: I have marked it, Your Honor.

THE COURT: That is No. 5, is it?

THE DEPUTY CLERK: No. 4, Your Honor.

THE COURT: I thought the accounting was No. 4.

THE DEPUTY CLERK: That is the only thing he has given me to mark, Your Honor. The last paper he gave me to mark is marked No. 4.

THE COURT: Is this the same exhibit that you showed the witness and asked him if it refreshed his memory as to the name of the accountant?

MR. BURKE: Yes, this is that one, Your Honor. That's No. 4.

39 THE COURT: Very well. You are offering Plaintiff's Exhibit No. 4 at this time, is that correct?

MR. BURKE: That is correct, Your Honor.

THE COURT: And you have seen this exhibit, Mr. Arness?

MR. ARNESS: I have, Your Honor.

THE COURT: You object to it?

MR. ARNESS: Yes, because it embodies a substantive report from an accountant who is not here to be cross-examined.

THE COURT: Let me see the report.

(Exhibit No. 4 handed to the Court.)

THE COURT: What does this have to do with the schedule of expenses?

MR. BURKE: Your Honor, this is what I wanted to observe before: We are offering this statement to indicate — merely for the purpose of showing that we had to make an audit there and that we spent $825 in connection with the audit. We are not offering it for the purpose of the figures contained therein, because our own local accountant has those figures laid out for us. That merely had to do with the prosecution of this man there and the necessity of engaging an accountant, which we had to do because we couldn't proceed without that over there. We couldn't bring
40 our auditor down there because the cost would have been greater than the cost incurred in getting that audit made in Norfolk.

MR. ARNESS: If it is for that purpose, Your Honor, there is already testimony. The exhibit does not fulfill that purpose.

THE COURT: I will admit Plaintiff's Exhibit No. 4 in evidence not as proof of any of the facts contained in the report but solely for the purpose of showing that an accountant was engaged to make an audit or report.

MR. BURKE: Thank you, Your Honor.

(Plaintiff's Exhibit No. 4, for identification, was received in evidence.)

BY MR. BURKE:

Q. Now, Mr. Morrissette, in addition to the money which you paid out to the accountant for Exhibit No. 4 and the work he did incident to that, what other expenditures were incurred by your company in connection with the investigation? A. There were travel expenses to Norfolk, seven trips amounting to $350; postage for mailing inquiries to customers and creditors and associated carriers, $150; labor, that is, clerical costs amounting to $2,822.50, and they were computed at the hourly rates of those persons engaged on the work. I have that itemized here.

41 Q. Is that all, sir? A. For presentation.

Q. What did that total?

THE COURT: The witness said the total was $2,822.50.

MR. BURKE: I don't mean just the clerical work; I mean the total of all the expenses.

THE WITNESS: $4,157.50.

MR. ARNESS: Your Honor, may the record reflect that all of this testimony was subject to my earlier objection that none of these expenses are recoverable under the policy and were not incurred at the written request of the defendant.

THE COURT: The record indicates your objection.

Go ahead.

BY MR. BURKE:

Q. Mr. Morrissette, when was this schedule prepared to which you are referring, and by whom? A. It was prepared by me at the time of submission of the claim.

Q. From where did these figures come? A. From records maintained by me of the time of these employees engaged in this investigation.

MR. BURKE: Would you mark that, please?

42 THE DEPUTY CLERK: Plaintiff's No. 5.

(Document was marked Plaintiff's Exhibit No. 5, for identification.)

(Document shown to opposing counsel.)

MR. BURKE: I would like to offer Plaintiff's No. 5, if Your Honor please, as a summary of the expenses in detail incurred by the plaintiff in connection with the investigation.

MR. ARNESS: I repeat the earlier objection but I have an additional objection, Your Honor, which is that even if these items of expense had been incurred at the written request of the company that the policy provides that even for recoverable expenses, there should be no payment for loss of earnings of the insured, that is, for the salary of any of the employees of the insured connected with anything they might do. That

appears in the policy under condition 7, which we will refer to later.

THE COURT: The Court will overrule the objection. The exhibit will be admitted.

(Plaintiff's Exhibit No. 5, for identification, was received in evidence.)

BY MR. BURKE:

Q. Now, Mr. Morrissette, during your trips to Norfolk, did there come a time when you asked me to accompany you there on one of these trips in connection with the investigation? A. Yes.

43 Q. And did I go on that trip with you? A. Yes.

Q. Can you tell me, sir, what if anything we did on the occasion of our visit there? A. We found a customer who had been moved—

MR. ARNESS: Excuse me. Your Honor, I object. The question is what did they do. I don't think this is responsive.

THE COURT: I suppose that finding someone would be what was done.

Go ahead.

THE WITNESS: We found a customer who had been moved by our employees in Norfolk and for which we knew we had not received the proceeds in Washington. That customer happened to have been the proprietor of a hardware store and the entire hardware store was moved from one location to another. He gave us the receipt that had been presented to him for the services rendered.

BY MR. BURKE:

Q. Was there any record in the books of your company covering the receipt of such money? A. There was none.

44 MR. ARNESS: May I move to strike that as obviously hearsay, Your Honor?

THE COURT: The motion is denied.

BY MR. BURKE:

Q. Subsequent to this, Mr. Morrissette, was there any conversation held with any of your other Norfolk employees regarding these unofficial moves? A. Yes, there were.

Q. And do you have one or more employees who are familiar with this? A. Yes, I do.

Q. Now, Mr. Morrissette, over approximately what period of time did this preliminary investigation take? A. It ran into four or five months.

Q. Did there come a time, sir, when you prepared a proof of claim? A. Yes.

Q. Where did you obtain the forms, if you know? A. From the insurance company.

Q. Was that Mr. Grier? A. Yes.

MR. BURKE: Would you mark this?

45 THE DEPUTY CLERK: Plaintiff's Exhibit No. 6.

(Document was marked Plaintiff's Exhibit No. 6, for identification.)

(Document shown to opposing counsel.)

MR. BURKE: Your Honor, I had this marked as Plaintiff's No. 6 but Mr. Arness just gave me the original and we would just as soon use the original. I wonder if he would mark this as Exhibit No. 6 instead.

THE COURT: It will be so marked.

(Original of document previously marked Plaintiff's Exhibit No. 6 for identification was marked and substituted as Plaintiff's Exhibit No. 6 for identification.)

BY MR. BURKE:

Q. I show you Plaintiff's Exhibit No. 6, Mr. Morrissette, and ask you whether that was the first preparation of the proof of loss that was made by your company? A. Yes, it is.

Q. How much is that proof of loss covering? A. The total amount

of money?

Q. Yes, sir. A. $15,252.62.

46 Q. What is the date of that? A. The 1st day of February, 1960.

Q. Now, Mr. Morrissette, prior to that date, were there any conclusive figures or sufficient figures available for you to have prepared any other proof of claim or proof of loss? A. No, they were not and these proved inconclusive also.

Q. Now then, after you prepared that and filed it, did your investigation continue? A. Yes.

Q. Let me ask you this, Mr. Morrissette: Subsequent to the filing of this, was your investigation continued with the full knowledge and approval of the representative of the defendant company? A. Yes.

Q. With who else other than Mr. Grier and the gentleman in Norfolk did you deal with then here in Washington? A. The Insurance Company sent an auditor to our office and we discussed it in detail with him; and then shortly after that, another party from the local office, I think by the name of Martin, came to discuss a settlement with us.

Q. Can you tell me, sir, approximately when this meeting with Mr. Martin took place? A. My best recollection would be sometime in April of 1960.

47 Q. And at that time, do you recall where that meeting took place? A. In your office.

Q. And do you recall who was present besides Mr. Martin and yourself? A. Mr. Gruber.

Q. And was I there? A. And you.

Q. At that time, sir, did Mr. Martin produce the audit which had been made by the accounting or auditing office of the defendant company? A. Yes.

MR. BURKE: Will you mark this, please?

THE DEPUTY CLERK: Plaintiff's Exhibit No. 7.

(Document was marked Plaintiff's Exhibit No. 7, for identification.)

(Document shown to opposing counsel.)

BY MR. BURKE:

Q. Mr. Morrissette, I show you Plaintiff's Exhibit No. 7 and ask you to tell us what that is? A. It is an auditing report by a Mr. R. P. Allen, further identified as Bala-Cynwyd Auditing, dated April 13, 1960.

48 Q. Now then, when did that first come to your attention, Mr. Morrissette? A. I think it was sometime during April of 1960.

Q. Was that a copy of one of the documents which Mr. Martin produced at our conference in April of 1960? A. Yes.

Q. Mr. Morrissette, can you recall how many conferences you had with Mr. Martin, telephone or personal? A. It seems to me we met with him three times and I talked to him on the phone several times. I don't remember just how many.

Q. Did Mr. Martin or Mr. Grier, or any person in behalf of the company, any time during your negotiations and before any suit was filed ever claim that you didn't file proper proofs of claim? A. Never.

MR. ARNESS: I object, Your Honor, that is not a claim in defense of this action.

THE COURT: I think the question is addressed to statements made. I will overrule the objection.

The witness has answered, "Never". Go ahead.

MR. BURKE: I would like to offer Plaintiff's No. 6, Your Honor, which I overlooked offering before.

49 THE COURT: This is the proof of claim dated February 1st, 1960?

MR. BURKE: That is right, Your Honor.

MR. ARNESS: No objection, Your Honor.

THE COURT: The exhibit will be admitted.

(Plaintiff's Exhibit No. 6, for identification, was received in evidence.)

BY MR. BURKE:

Q. Now then, Mr. Morrissette, who had set up the bookkeeping system and accounting system for the Ace Van & Storage Company on and before 1958 and subsequent to 1958? A. The David M. Gruber Company.

Q. How long has the David M. Gruber Company been handling your books and records? A. Nine years.

Q. And in that capacity, Mr. Morrissette, is the David M. Gruber Company and its help familiar with the method of bookkeeping of your company and the detailed records of your company? A. Yes.

Q. In connection with the investigation which was made by you and your employees of this loss, did you, during that time, seek the help of the Gruber Company and their cooperation in preparation of your details and the documentation? A. Yes.

50 Q. In connection with that, what if anything did they prepare to identify the loss? A. They made a payroll analysis that reflected a discrepancy between—

MR. ARNESS: Your Honor, I object.

THE COURT: Your objection is sustained.

MR. BURKE: Is that as to the statement that they made a payroll analysis or as to the further testimony?

THE COURT: To the further testimony, obviously.

BY MR. BURKE:

Q. And in addition to the payroll analysis, Mr. Morrissette, what if anything else did they do? A. Prior to the submission of my claim?

Q. Well, prior and subsequent to. A. They have made a thorough audit of the entire records of our office as it pertains to the Norfolk operation and have established a—

MR. ARNESS: I object, Your Honor.

THE COURT: Your objection is sustained.

BY MR. BURKE:

Q. Don't tell us their conclusions; just tell us the work they did.

A. That is it.

51 Q. Now, in support of their analysis, do they have all original bills and statements and records? A. They do.

Q. Now then, Mr. Morrissette — if you know, sir — what is the distinction between the analysis which was prepared by Gruber and Company and this Plaintiff's Exhibit 7?

MR. ARNESS: I object to that, Your Honor. He would be just testifying to his opinion.

THE COURT: I believe this is a discretion of his opinion. I think the documents will speak for themselves.

MR. BURKE: Very well. I would like to offer Plaintiff's Exhibit No. 7, Your Honor.

MR. ARNESS: I object to it, Your Honor, for this reason: This document which I have advised Mr. Burke from the inception of this litigation is an investigative report made by Mr. Normandin, who is an employee of Liberty Mutual Insurance Company, who was asked by the company in the spirit of cooperation in an attempt to arrive at an amicable settlement of this claim, was brought in to listen to claims that were made in behalf of the insured and to analyze them and come up with some sort of conclusion. This is not a professional audit; it is an effort that was made in the spirit of trying to compromise this case.

52 As Mr. Burke has told you, a copy was delivered by Mr. Martin who came to discuss settlement. Clearly, settlement discussions in efforts toward reaching a settlement are not material as far as evidence is concerned. We object to it on that basis.

THE COURT: What is the purpose for which this exhibit is offered in evidence? What probative purpose?

MR. BURKE: Your Honor, for the contents of it. They have exactly the same figures which we have on those claims which they admit and they are denying the wage losses and a few other losses, which we say

we are entitled to be repaid and which they are refusing to recognize.

This is a basis on which we all had perfect agreement at the time of the conference. The discussions which took place at my office at that time were founded upon this particular audit that they made, copies of which he gave to Mr. Morrissette and to Mr. Gruber and which they discussed on the various occasions when they spoke with one another by telephone, both Mr. Gruber and Mr. Martin and Mr. Morrissette and Mr. Martin.

The losses are detailed there over several pages, so that this is an actual audit which was made by the Insurance Company's office. I
53 don't know whether they used accountants or who they used, but this was a complete audit that they made in which they won't recognize certain items for which we insist we are entitled to be paid. This is an admission, if nothing else.

MR. ARNESS: The difficulty with this document, Your Honor, is that this was a proposal for settlement which was rejected. Now plaintiff would like to use it as a springboard for further figure. This is the very reason why settlement negotiations are not proper evidence. If we had known that they would not have accepted a bona fide settlement overture, we would never have accepted anything and let them prove it, which we are entitled to have them do.

THE COURT: If the document was made for the purpose of settlement discussions and as a result of settlement discussions, it is not admissible in evidence, of course.

I will refrain from passing upon the admissibility of the document to permit whatever testimony may be offered on either side that will enable the Court to determine its admissibility.

It will be marked as Plaintiff's Exhibit No. 7 for identification only at this time.

BY MR. BURKE:

Q. Mr. Morrissette, at the time Mr. Martin had his visit with you

54 at my office and with Mr. Gruber present, had you already submitted your first initial proof of loss? A. Yes.

Q. In connection with the submission of your proof of loss and in your conversation with Mr. Martin, did Mr. Martin indicate to you that he had prepared a different analysis which showed a lesser figure due? A. Mr. Martin represented himself to me as an auditor and this was in rebuttal against our claim.

Q. And was there any question there about preparing this for purposes of settlement rather than to assess and analyze the value of the claim? A. I never understood it from anyone that it was something to negotiate upon; it was simply a rebuttal against what I had claimed.

MR. BURKE: I repeat my offer, if Your Honor please.

THE COURT: I will withhold passing on the admissibility of the document until further in the case.

Go ahead.

MR. BURKE: Would Your Honor indulge me for just one moment?

THE COURT: Certainly.

(Short pause in proceedings.)

BY MR. BURKE:

Q. Mr. Morrissette, in connection with your investigation of your
55 losses in Norfolk through Mr. Hicks, did there come a time when there was called to your attention some discrepancies in the gasoline account? A. Yes.

Q. As a result of that, did you make an investigation through the gasoline companies and through your other employees? A. Yes.

Q. What if anything did you find had been done with the gasoline which was kept on your premises and which was kept there for the use of your vehicles?

MR. ARNESS: I object, Your Honor. This calls for hearsay.

THE COURT: I believe this would be hearsay unless the witness can testify to facts within his personal knowledge.

BY MR. BURKE:

Q. Just tell us what you have discovered from your own personal knowledge.

THE COURT: Ask the witness what he did.

THE WITNESS: I paid for gasoline to the Amoco Gas and Oil Company for gasoline that was not used by my company.

BY MR. BURKE:

Q. In what manner did you ascertain that it was not used by your
56 company? A. I recovered receipts from carriers associated with my company that had been submitted to them in justification of expenditures by their drivers wherein they had taken gas from my pumps in Norfolk.

MR. ARNESS: Your Honor, I move to strike that. Obviously, that goes to the veracity of other individuals.

THE COURT: I have said it isn't necessary to object to obvious hearsay. The Court is not going to consider obvious hearsay. There is no jury present. The Court recognizes hearsay when it hears it.

MR. ARNESS: I know that, Your Honor. Then I will not object on that basis any more.

THE COURT: Very well.

BY MR. BURKE:

Q. Now, Mr. Morrissette, please do not tell us anything that someone else told you. That is known as hearsay. Just tell us what you yourself discovered.

Now, was there a record in your books as taken from the records of the gasoline company with whom you dealt of the number of gallons of gasoline which were charged to your company during the period of time that Mr. Hicks worked for you? A. Yes.

Q. Was there a record in the books of your company which showed
57 how much gasoline was consumed by those authorized to use that gasoline? A. Yes.

Q. Was there any gasoline for which you were charged which was unaccounted? A. Yes.

Q. Who was in charge of that gasoline? A. Mr. Hicks.

Q. Did you, in your conversation with any of your employees, ascertain the disposition of some of that gasoline that was missing? A. Yes.

Q. Do those employees have personal knowledge of that? A. Yes, sir.

Q. Mr. Morrissette, during the time that you were involved in the prosecution of Mr. Hicks in Norfolk, did there come a time when you were present at a meeting with Mr. Gaylor Hicks and a representative of the Policy Department of Norfolk or police of Norfolk when Gaylor James Hicks, Jr. answered certain questions and made certain admissions to the police? A. Yes.

MR. BURKE: Will you mark this, please?

THE DEPUTY CLERK: Plaintiff's Exhibit No. 8.

(Document was marked Plaintiff's Exhibit No. 8, for identification.)

58 BY MR. BURKE:

Q. I show you Plaintiff's Exhibit No. 8 and I ask you whether that is a photocopy of the questions and answers which were presented to Mr. Hicks on that occasion and given by him on that occasion in your presence? A. Yes.

Q. I ask you whether or not the two witnesses who signed that — I ask you to tell us who they were, if you know. A. This is Miss Shipman and Mr. Vaughn. (sic)

Q. Who are they? A. Detectives for the City of Norfolk.

MR. BURKE: Now, if Your Honor please, I am going to offer Plaintiff's Exhibit No. 8 and the contents thereof to indicate an admission by the employee of his malfeasance in the presence of the Police Department and in the presence of Mr. Morrissette.

I don't know whether Your Honor is going to admit this or not because I presume that the same objection could be raised by counsel that he can't cross-examine and our position is this: That Mr. Hicks was one of the employees whom the Insurance Company agreed to secure us against and that admissions made by him are admissions, insofar as we are concerned, made by the defendant company insofar as the dishonesty is concerned. We have questions and answers here which were presented
59 to Hicks during the time that this was going on and prior to the time that he had reason to prepare himself so that he might ward some of these off and these were made in the presence of Mr. Morrissette as against the interest of Mr. Hicks, and I offer Plaintiff's Exhibit No. 8.

MR. ARNESS: I object, Your Honor.

THE COURT: The objection is sustained.

MR. BURKE: I don't know whether I am required to or not, but I would like to take exception, Your Honor.

THE COURT: No exceptions are required in this Court. They were abolished in 1938.

MR. BURKE: Thank you, sir.

Would you mark this, please?

THE DEPUTY CLERK: Plaintiff's Exhibit No. 9. (Document was marked Plaintiff's Exhibit No. 9, for identification.)

BY MR. BURKE:

Q. Mr. Morrissette, I show you Plaintiff's Exhibit No. 9 and ask you if you can identify that for us? A. (Perusing exhibit) This is an analysis of the Norfolk operations of our company for the period January 15, 1958 through October 1959.

Q. Who was that prepared by? A. The David M. Gruber Company.

Q. Mr. Morrissette, is that the analysis supported by your original books and records which was prepared to establish the exact amount
60 of your loss in this case? A. Yes.

Q. Who would be the person most qualified to give us the information on that, in your opinion, Mr. Morrissette?

MR. ARNESS: I object to that, Your Honor.

THE COURT: The objection is overruled.

THE WITNESS: David M. Gruber.

BY MR. BURKE:

Q. Now, Mr. Morrissette, who is Mr. Ernest Shepherd? Is that Ernest or Edmund? A. Edmund Shepherd.

Q. Who is Edmund Shepherd, Jr.,? A. He is an employee of our company who was formerly assigned to the Norfolk office.

Q. And who is Mr. Cordes? Would you give us his full name? A. Alfred Cordes is also an employee of our company, formerly assigned to the Norfolk operation.

Q. Are these two gentlemen the ones who were working in the Norfolk office during the time that Mr. Hicks was manager there? A. They were working on trucks and in the warehouse at Norfolk.

61 Q. Mr. Morrissette, I think you have testified that you went to Norfolk and you met this gentleman from the Insurance Company and Mr. Hicks on a Saturday morning shortly after you had your first meeting here with Mr. Grier and I think you said your boys went with you. You mentioned Arthur Morrissette, Jr., Donald Morrissette and Kenneth Morrissette. Now, were these boys employed by the Ace Van & Storage Company? A. Two of them are.

Q. Which ones. A. Arthur E., Jr. and Donald J.

Q. How old was Arthur Jr. at that time? A. Twenty-three.

Q. And how old was Donald? A. Twenty.

Q. Now, who else went with them and with you to Norfolk? A. My daughter-in-law and my wife.

Q. Your daughter-in-law is Arthur E. Morrissette, Jr.'s wife? A. Yes.

Q. Now, you discharged, I think you testified, Mr. Hicks that same Saturday. A. Yes.

Q. Who took his place then as manager of your Norfolk warehouse?

62 A. Arthur E., Jr.

Q. I show you Plaintiff's Exhibit No. 3 and at the bottom of the page, the signature Mrs. Jacqueline D. Morrissette. A. Yes.

Q. Who is that, sir? A. That is my daughter-in-law.

Q. She was a witness on that document? A. Yes.

Q. Directing your attention again to Plaintiff's Exhibit No. 9, I ask you, sir, if you can look at that exhibit and tell me what is the exact extent of your loss due to the defalcation of Mr. Hicks?

MR. ARNESS: I object, Your Honor.

THE COURT: I believe this requires testimony on the part of the person who prepared the report.

MR. BURKE: We are going to have that, Your Honor, but I thought you might want some foundation. I will strike that.

Your Honor, I would like to terminate my questioning of this witness but I would like to reserve the right to recall him if necessary.

THE COURT: You may.

Mr. Arness.

MR. ARNESS: Thank you, Your Honor.

63 CROSS EXAMINATION

BY MR. ARNESS:

Q. Mr. Morrissette, you have told us that you engaged this firm of Edmondson, LedBetter & Ballard in Norfolk, Virginia, in order to prepare a report. That report was submitted to the Commonwealth Attorney, Honorable Edwin E. Tabb, was it not? A. Yes.

Q. And you got a copy of it at that time, or about that time? A. Yes.

Q. That is the report which is dated December 30, 1959, is it not? A. Yes.

* * * * *

64 Q. Now, you told us that Mr. Hicks called when the first ball was pitched to open the 1959 World Series; is that correct? A. Yes.

Q. That was on a Sunday, you said? A. Yes.

* * * * *

Q. All right, sir. Mr. Morrissette, Mr. Gruber had already been asked by you to do certain accounting and statistical studies prior to that call, had he not? A. Yes.

65 Q. And for the next week or ten days or two weeks after you first talked to Mr. Gruber, he did devote a certain amount of time in making certain studies for you, did he not? A. Prior to the call by Mr. Hicks?

Q. No. Within the next ten days or two weeks after you first spoke to Mr. Gruber about the matter. A. Yes.

Q. And then, from that point on, Mr. Gruber didn't make any detailed analysis or studies until well after this case was filed in this court and at issue, did he? A. Yes, that is true.

* * * * *

67 Q. Mr. Hicks was in every sense of the word the manager of your Norfolk operations, was he not? A. We had a direct telephone line so that he was under the direct supervision of either my son or I, hourly. He did have latitude in his judgments in operation, but no authority at all for disbursement of funds.

* * * * *

68 Q. I see. Now, Mr. Hicks advertised for the Ace Van & Storage Company in the Norfolk area, did he not, by placing newspaper ads and using other means available to him? A. We found that he did, but without our authority.

Q. You mean you never authorized him at any time to do any advertising at all? A. No, I don't say that.

69 Q. Well, my question to you was: Did he, from time to time, advertise for Ace Van & Storage -- and I will put it first -- with your authority in the Norfolk area? A. Yes.

Q. And he also did, as you found out later, advertising that you had not previously authorized? A. Yes, sir.

Q. Now, when you went to Norfolk, was there ever a time when Mr. Hicks had a secretary or a girl in the office? A. Yes.

Q. Was there even a time when he had two? A. No, and he didn't always have a girl.

Q. Did it ever come to your attention that he did have two, that he was carrying two on the payroll? A. I don't recall it.

Q. Well, he had authority to either have a girl or not have one at his discretion, depending on what the requirements of the business were at the time, did he not? A. Not entirely at his discretion, no. As I say, we were to be advised of any personnel changes contemplated or actual.

Q. In other words, if he hired a girl, he was supposed to tell you about her? A. Sure.

70 Q. Now, the Ace Van & Storage Company had various charge accounts in various stores in the Norfolk area, did they not? A. Yes.

Q. And from time to time over the course of the years, you had difficulty with trucks, trucks would break down and they would have to be repaired on an impromptu basis, wouldn't they? A. Yes.

Q. And it was Mr. Hicks' job to keep the operation running, isn't that so? A. Yes.

Q. He was also responsible for the appearance and maintenance of your warehouse there, was he not? A. Yes.

Q. Paint it when the occasion arose, sir? A. For painting, he would have consulted us.

Q. For minor repairs around the warehouse, was he authorized to do those as the manager of your company? A. I can't visualize just what you are referring to, but I would say if they were minor, yes.

Q. And if it was major, he was supposed to report in to get approval? A. Yes.

71 Q. Did you ever set down any hard and fast rule as to what was minor or what was major, or was this a matter of discretion? A. Well, there were no formalized rules.

Q. Now, there are peak periods in the moving business, are there not? A. Yes.

Q. Sometimes during the winter, you experience a very slack season, whereas now around June 1st, a lot of people move and there is a great demand for your services? A. Yes.

Q. Now, Mr. Hicks had the responsibility of maintaining the personnel, the goodwill of the company personnel and their satisfaction so that when peak periods came along, you would have employees there equipped to do your contracts. He had that responsibility, didn't he? A. Yes.

Q. And you had certain long-term employees that you would carry day in and day out whereas at peak seasons, you would hire certain other employees just off the street or from your competitors for a dollar or a dollar and some an hour, wouldn't you? A. Yes.

72 Q. And on that, peak seasons, Mr. Hicks had the responsibility to see to it that he had sufficient labor available to do the job, didn't he? A. Yes.

* * * * *

Q. Now, Mr. Hicks was a young man, wasn't he, when he came to you? A. Yes.

Q. Do you remember his age, sir? A. Yes.

Q. What was it? A. Twenty-six.

73 Q. Now, he was quite a good looking and quite a personable boy, wasn't he? A. Yes.

Q. As a matter of fact, even though he had certain factors, he sold himself to you in every sense of the word? A. Yes.

Q. You, before you sent him down to Norfolk, told him by way of a pep talk what you wanted him to accomplish down there and that you wanted this to be a thriving organization that would accomplish big things and do a lot of things for the company and, incidentally, for Mr. Hicks if he would succeed. You had a talk like that, didn't you? A. I am sure I talked to him in an encouraging manner.

Q. Now, did you give him any directions as to how he might promote more business or how he might cut losses or how he might make a

more financially attractive operation in Norfolk, or did you leave that entirely to his discretion? A. I am sure that I imparted to him the benefits of what I believed to be my experience.

Q. And beyond that, you left it to his imagination and to the go-getting spirit that you detected in him when you met him, didn't you? A. Well, I had to depend on him for some initiative.

* * * * *

74 BY MR. ARNESS:

* * * * *

75 Q. Your instructions to him were not to close up if he ran out of forms but to go on in some way? A. I never had that issue, Mr. Arness.

Q. You supplied Mr. Hicks with an automobile for his use while in Norfolk, did you not? A. Yes.

Q. That was a station wagon? A. Yes.

Q. Do you remember what make it was? A. A Chevrolet.

Q. And this was for his own personal use as well as business use? In other words, he drove it home back and forth to work and came up to Washington when he had to with it? He used it as his own car, didn't he? A. It was not personal in the broad sense of the word; it was for transportation in the conduct of the business and to get him back and forth from work to home.

76 Q. Did you give him instructions if he was going to take his wife to the movies at night, that he was not to use that car? A. Well, not that precisely, no.

Q. Now, you said that all the bookkeeping was done in Washington. Mr. Hicks, as manager of the Norfolk operation, had a considerable amount of bookkeeping to do himself in his office, did he not? A. He was not obligated to do any bookkeeping work as such.

Q. By bookkeeping work, you may think more technically than I do. He would have the obligation to fill out and retain and file forms and do various correspondence and make various cash entries, and things of that nature, would he not, and then forward copies of what he had done to Washington? A. Paper work, yes. But I think in terms

of bookkeeping is ledgers, and journals, et cetera. He didn't have any of that.

Q. He had a petty cash system, petty cash box or whatever it was, in his office there in Norfolk, did he not? A. He had a $50.00 petty cash fund.

Q. Now, with reference to Exhibit No. 2, which is the memorandum of the conference that you had with Mr. Gruber and Mr. Grier on October 9, 1959, you gave Mr. Grier a copy of that memorandum for his own use, didn't you? A. Yes. He may even have had the original.

77 Q. I show you this and ask you if this is a copy of the document that was introduced as Plaintiff's Exhibit No. 2? A. (Perusing document) It appears to be a copy.

MR. ARNESS: May I have this marked as Defendant's Exhibit No. 1 for identification?

THE COURT: The clerk will so mark the exhibit. (Document was marked Defendant's Exhibit No. 1, for identification.)

BY MR. ARNESS:

Q. That was typed in your office, sir, or wherever the conference was held? A. It was typed in Mr. Gruber's office.

Q. Now, this document which has been marked as defendant's Exhibit No. 1 for identification -- Excuse me.

(Document shown to opposing counsel.)

BY MR. ARNESS:

Q. -- does not have the pencil insertions that appear in Plaintiff's Exhibit No. 2 in evidence, does it, sir? A. It does not.

Q. Does that indicate to you that after Mr. Grier was given his copy, some changes were made on that document Plaintiff's Exhibit No. 2? A. I don't know. As I say, I thought he had the original also.

78 Q. Now, other than this document which has been marked Plaintiff's Exhibit No. 2 for identification, do you have any paper? By that I mean to include correspondence, memorandum, anything else in writing from the Liberty Mutual Insurance Company or any of its representatives?

A. I don't have anything here, but I think my counsel might have.

Q. Do you have anything specific in mind, sir? A. No, but I just have a rather indefinite recollection that there is some correspondence in my counsel's possession.

Q. Correspondence that occurred before or after the lawsuit was instituted? Do you recall that? A. I think prior to the lawsuit and after, perhaps.

MR. ARNESS. Your Honor, may I inquire of the Court whether it would be all right to ask for the production of that correspondence if it exists at this time?

THE COURT: Do you have any correspondence between the plaintiff and the defendant that predates the lawsuit?

MR. BURKE: I would have to look through my records.

THE COURT: Will you do that.

(Counsel complied.)

THE WITNESS: May I qualify my answer, sir?

THE COURT: Go ahead.

79 THE WITNESS: I feel that maybe the correspondence that lingers in my mind could have been between your office and my counsel, Mr. Arness.

MR. ARNESS: Well, let me have this marked as Defendant's No. 2 for identification, and this letter dated November 10th as Defendant's Exhibit No. 3 for identification. (Documents were marked Defendant's Exhibits No. 2 and No. 3, for identification.)

BY MR. ARNESS:

Q. Mr. Morrissette, let me show you this document which has been marked Defendant's Exhibit No. 2 for identification which is a letter dated November 12, 1959, and ask you if you can identify that, sir? A. (Perusing exhibit.)

MR. BURKE: I have a letter here, sir.

(Document handed to counsel.)

BY MR. ARNESS:

Q. Can you identify that letter? A. You mean, you want me to read it?

Q. No. Is this a letter from Liberty Mutual Insurance Company to Ace Van & Storage Company addressed to 2516 Ingleside Road, Norfolk, Virginia? A. Well, it's not my intention to be technical but it doesn't say who it is from.

80 Q. You are right, the letterhead isn't on this carbon copy. Did you ever hear the name Kenneth Hubert, claims representative, as being a Liberty Mutual representative? A. No, I can't recall the name.

Q. Well, do you recall -- Doesn't the sight of this carbon copy which says Re: Ace Van & Storage Company - Gaylord Hicks, and the claims number which is your claims number, refresh your recollection that Ace Van & Storage Company received this letter? A. Mr. Arness, I am not trying to deny anything but I can't answer your question positively.

Q. Let me ask you this: This letter, whether you recall receiving it or not, says, We are enclosing proof of loss form. You do recall receiving the form? A. Oh, yes, I have the form.

Q. Does this letter dated November 12, 1959, refresh your recollection that you received them on or about that date? A. Yes. I think we ought to read the whole letter.

* * * * *

81 BY MR. ARNESS:

Q. I show you now what has been marked Defendant's Exhibit No. 3 for identification, which is a carbon copy of a letter and the original of which Mr. Burke has just handed me. I show you both the copy and the original and ask you if you have ever seen that letter? A. (Perusing documents) Yes.

Q. Now, so that you can look at the original -- You told us this morning or at the beginning of your testimony that in the conversation with Mr. Grier, you asked him about payment of expenses and he said he would see what he could do. Now, the letter that has been marked Defendant's Exhibit No. 3 for identification is Mr. Grier's reply to you, is it

not, and in that he tells you that he would not be able to pay anything for Ace Van & Storage Company's investigation, that that was a matter of your own concern, didn't he, sir? A. Yes, he says that in this letter but we had already followed his other instructions prior to that.

Q. As far as being -- A. This is seven or eight weeks later.

Q. As far as having a commitment, was this the only thing that was ever gotten by way of receiving a commitment, sir?

THE COURT: By this you mean in writing?

MR. ARNESS: Yes.

82 THE WITNESS: Yes.

MR. BURKE: Your Honor, other than Exhibit No. 2 of Plaintiff which is also in writing and signed by a representative of the company.

THE COURT: There was only one question asked about Exhibit No. 2 and that was whether it placed the approximate date as to receipt of the form.

MR. BURKE: I don't mean Defendant's Exhibit No. 2, Your Honor; I mean Plaintiff's Exhibit 2, that is the memorandum prepared during the conference between Mr. Grier and --

THE COURT: Plaintiff's Exhibit No. 2 has been admitted in evidence.

* * * * *

83 Q. Yes, sir. Do you remember the dates of these times? I am interested in the dates if you have them. A. I can't tell you the dates but they would run from October 10 until the trial.

Q. And when was the trial, sir? A. Well, that would be from my memory and it wouldn't be too accurate. It could be established, of course. It was in December, I think, or maybe January.

Q. It was certainly after the December 30th date on this report submitted? A. Yes, it was probably in January.

Q. Did you attend the trial? A. Oh, yes.

Q. And were you there at the time that the jury rendered its verdict? A. Yes.

Q. What was that verdict?

MR. BURKE: I object, Your Honor. That has no bearing on this case.

THE COURT: What is the materiality?

MR. ARNESS: To show that the person they accused of a criminal action was acquitted.

* * * * *

86 Q. Let me make my question more precise then: You claim in this lawsuit that Mr. Hicks did certain dishonest actions. Prior to the date of your conversation with him, did you have any personal knowledge--by that I mean things you saw or heard or knew other than what someone may have told you -- of any dishonest activity on the part of Mr. Hicks?

87 A. No.

Q. And, of course, after you fired him, he didn't do any dishonest actions with reference to your company, did he? A. I can't speak with complete knowledge with respect to that.

* * * * *

88 REDIRECT EXAMINATION

BY MR. BURKE:

Q. Mr. Morrissette, in response to a question which I had asked you about the conference that we had in my office with a Mr. Martin of the Liberty Mutual Insurance Company, Mr. Gruber and myself, you had made the remark that Mr. Martin represented himself as being the auditor and then you wanted to make another statement and His Honor told you to only answer the questions when you were asked. Now, at that point, sir, had you wanted to make a correction of that statement? A. Yes, I did.

Q. Would you tell us what that correction is? A. Well, Mr. Martin was not the one who represented himself as an auditor, it was the other gentleman whose name appears on the paper that is in evidence who represented himself as the auditor.

Q. And who was Mr. Martin? A. Mr. Martin was a representative in their local office here in Washington.

Q. Of Liberty Mutual Insurance Company? A. Of Liberty Mutual Insurance Company.

Q. Now, Mr. Arness spent considerable time questioning you about the forms. As a matter of fact, Mr. Morrissette, were there any instruc-
89 tions to your manager of your Norfolk office as to the use of only those forms which came out of your Washington office because of their registration? A. Oh, sure. They were all controlled forms.

Q. Sir, did you and your Washington staff make it your business to see that Norfolk was completely supplied with those particular forms? A. Diligently.

Q. Was there ever any time, even during the period when Mr. Hicks may or may not have been using forms which he printed up for himself, that he did not have an adequate amount of forms that you had supplied him with?

MR. ARNESS: Objection, if the Court please.

THE COURT: I will overrule the objection.

Answer the question.

THE WITNESS: My answer is that I found duplicates in the office of my own forms, plus his forms.

BY MR. BURKE:

Q. Mr. Arness asked you about the pencil notations on Plaintiff's Exhibit No. 2. Mr. Morrissette, who typed up Plaintiff's Exhibit No. 2? A. This was done in the office of David M. Gruber.

Q. And it was then returned to the conference room, was it not?
90 A. Yes.

Q. At that time and before the execution, was there any observation made about grammar corrections or wording corrections? A. I don't remember, but they are immaterial if you will notice them. They are stenographic errors.

Q. These notes, were they made by you, sir? A. Not by me. I don't remember doing that.

Q. You don't know who made those? A. I haven't any idea.

Q. So far as you know, was the copy which Mr. Grier received supposed to have been similarly corrected? A. I don't even remember, to tell you the truth.

Q. Now, there was a letter which had been sent to me by Liberty Mutual and Mr. Grier, dated November 10, 1959. I think you testified that this loss first came under your observation around the latter part of September. A. Yes.

Q. And the meeting with Mr. Grier was had on October the 9th.

THE COURT: The witness so testified.

BY MR. BURKE:

Q. Now, Mr. Morrissette, between October the 9th and November the 10th, had you already engaged all of this work? A. Sure.

91 Q. Counsel asked you a question about Mr. Hicks' prosec ution, whether he was acquitted. Do you know what charges were placed against him, for which he was tried? A. I don't think I could describe them in legal terms.

Q. Were they all of the numerous items which you had accumulated in the course of your investigation? A. No.

Q. Had you completed your investigation yet at the time he was prosecuted? A. The pressure of the courts were such that we couldn't complete the investigation; we had to take what we could to sort of satisfy the need.

Q. Did you personally have anything to do with the prosecution? A. No.

Q. You were merely a witness in the case? A. That's right.

Q. Now, counsel had asked you whether you had personal knowledge of any dishonest acts on the part of Mr. Hicks. Is there any question, Mr. Morrissette, but that Mr. Hicks was responsible for the receipts and accountings for those to your office, receipts of the Norfolk office? A. He was solely responsible for them.

92 Q. All right. Now, did you have personal knowledge of the reflections of the books and records on what was turned over to him and what

was returned to your company? A. I am sorry, I don't understand that question.

Q. Well, let me ask you this further: You have testified that you have sent out various letters to the various carriers to verify shipments and payment for them. Did you obtain verifications from various sources? A. Yes.

Q. And did those verifications then reveal to you that there had not been a full accounting of all of the shipments? A. It confirmed what he had already acknowledged to me.

Q. But you personally checked that out? A. Yes.

Q. So that it came within your personal knowledge after you checked it out? A. Surely.

Q. Did you have the same confirmation of the gas purchases and gas distribution? A. Yes.

Q. Did you have the same information from your payroll records as to how much payroll you paid out and how much payroll was used? A. Yes.

93 Q. Now, Mr. Morrissette, on the occasion of your first trip to Norfolk, did you come across any records which had been burned? A. Yes.

Q. Would you tell us about that? A. Partially burned. Some had been burned. Of course, we don't know what they were but we did recover some things that were still identifiable.

Q. And are those part of your exhibits, part of the records from which the accumulation of your losses were complied? A. They were given to my accountant.

Q. And they are reflected in this account? A. Yes.

Q. Now, Mr. Arness has referred you to the audit which you obtained in Norfolk on or about December 30, 1959. Had you at that time, with the help of this audit, had enough information so that you could possibly have filed a proper proof of claim? A. No, indeed.

Q. As a matter of fact, when you filed your proof of claim on February 1, 1960, had you then had a complete reflection?

A. I was discovering daily something new.

94 Q. And since that time, that has multiplied quite a bit, has it not?

A. Yes.

MR. BURKE: That is all, Your Honor.

THE COURT: Anything more, Mr. Arness?

MR. ARNESS: No, Your Honor.

THE COURT: You may step down.

(The witness left the stand.)

MR. BURKE: Mr. Gruber, please.

Your Honor, may I put Mr. Morrissette back on the stand for just one question?

THE COURT: You may.

Whereupon,

ARTHUR E. MORRISSETTE

resumed the witness stand and testified further as follows:

REDIRECT EXAMINATION (Continued)

BY MR. BURKE:

Q. Mr. Morrissette, prior to the time that Mr. Hicks was brought to trial on the criminal charge in Norfolk, Virginia, had there been any offer of a guilty plea on the part of Mr. Hicks? A. Yes.

Q. And was that turned down, sir? A. Yes.

95 MR. BURKE: Thank you, sir.

THE COURT: Step down.

(The witness left the stand.)

Whereupon

DAVID M. GRUBER

called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BURKE:

Q. Mr. Gruber, would you state your name? A. David M. Gruber.

Q. Where do you live? A. I live in Silver Spring, Maryland.

Q. What is your profession or occupation? A. I am a certified public accountant.

Q. And what is the name of your firm? A. At the present time, the name is as a sole practitioner David M. Gruber, Certified Public Accountant.

Q. Mr. Gruber, how long have you been thus engaged? A. About fifteen years.

Q. And in that capacity, sir, have you done the accountancy work for several schools and public institutions? A. Our work has been varied and has covered a number of different facets of accounting work, including public institutions.

96 Q. Have you done work for public utilities? A. Yes.

Q. Have you done work for various types of corporations? A. Yes, sir.

Q. Now, did there come a time when the Ace Van & Storage Company engaged your firm as its accountants? A. Yes.

Q. When was that, sir? A. About 1954.

Q. From that date to the present time, have you been the accountant for the Ace Van & Storage Company? A. That is correct.

* * * * *

106 Washington, D.C., Friday, June 7, 1963
107

EXCERPTS OF PROCEEDINGS

* * * * *

Whereupon,

DAVID M. GRUBER

having been previously duly sworn, resumed the witness stand, was examined and testified further as follows:

DIRECT EXAMINATION (Resumed)

BY MR. BURKE:

Q. Mr. Gruber, following the meeting at your office between Mr. Hicks, yourself and Mr. Morrissette, did Mr. Hicks then return to Norfolk? A. To the best of my knowledge, yes.

Q. And thereafter, Mr. Gruber, what if anything was done by you and Mr. Morrissette regarding Mr. Hicks and the possibility of a loss

to him? A. I suggested to Mr. Morrissette that he should immediately advise his attorney and the bonding company of this situation.

Q. By the bonding company, you mean the defendant here, the Insurance Company? A. Yes, sir.

Q. Then what was done? A. A meeting was held at my office at which Mr. Morrissette, yourself and Mr. Grier of the Insurance Company, and I were present.

108 Q. Can you tell us approximately how long that conference lasted? A. I would guess that it would have taken somewhere between an hour and a half and two hours.

Q. And what took place? A. We discussed with Mr. Grier the situation that had been uncovered by our analysis of the payroll hours for a certain test period of time. We also informed him of the actions of Mr. Hicks. We apprised him of what had taken place at that meeting and as a result of this meeting, at my suggestion -- I shouldn't say at my suggestion, but actually, I dictated a memorandum which met with the approval of the various parties there.

Q. I show you Plaintiff's Exhibit No. 2 and ask you whether this is a copy of the memorandum which you dictated in your office on that occasion? A. (Perusing exhibit) Yes, sir, this is a copy.

Q. Now, Mr. Gruber, how many of those there received executed copies of that, if you recall? A. To my knowledge, everyone would have received an executed copy.

Q. Including Mr. Grier? A. Certainly. He was a signatory to the memorandum.

109 Q. I direct your attention to paragraph 3 of this memorandum and I ask you to tell us what discussions which took place, if any, that led to the inclusion of paragraph 3 in that memorandum? A. I was personally concerned with the time element in preparing all of the supporting evidence for this possible claim and because there is a provision in the policy which refers to a 90-day period, there were uncertainties in my mind as to exactly how much leeway we had on this and I asked that this paragraph be inserted.

Q. Did Mr. Grier agree to that? A. Yes, sir.

Q. And was that the reason that paragraph 3 was included?

A. It was.

Q. Now, at that occasion, Mr. Gruber, was there any discussion or plans made for activity to be taken in Norfolk? A. Yes.

Q. And what was that? A. That Mr. Hicks was to be discharged. There was also some discussion, as I recall, about the possibility of criminal prosecution and in addition, of course, the investigation was to be commenced to attempt to determine the extent of the apparent shortages.

110 Q. Now, with regard to that investigation, was there any conversation as to the cooperation of the Insurance Company in that investigation? A. It was my impression that the Insurance Company would cooperate fully.

Q. In connection with that, as a first step, was any provision made for a representative of the company to meet with Mr. Morrissette at Norfolk? A. As I recall, there was; yes.

Q. Now then, subsequent to that time, Mr. Gruber, was there any conversation had between you and Mr. Morrissette regarding the necessity of preparing some kind of an analysis which had to be used in Norfolk, Virginia, and needed the services of an accountant? A. Could you be more specific, please?

Q. Was there a conversation between you and Mr. Morrissette regarding the necessity of preparing an audit in Norfolk to be used in the criminal prosecution, as to whether it was advisable for you to prepare it and be there or whether a local man should be used merely for the purposes of testimony? A. Yes, we discussed this. We discussed it several times and we finally came to a conclusion or decision that it

111 would be better if someone local to the scene could prepare the information for the States Attorney in Virginia.

Q. Now, Mr. Gruber, did there come a time when you were asked to undertake an examination of the records of the Norfolk operation for the specific purpose of determining the extent of the Ace Van & Storage Company loss? A. Yes.

Q. Did you make such a review and did you prepare a report for the Ace Van & Storage Company as a result of your examination?

A. Yes.

Q. Now, in making that examination, to what sources did you go?

A. We used two principal sources of determining the data that we would use to write the report: One of the sources was a direct contact with the various associated moving outfits who would have purchased commodities, such as, gasoline, perhaps packing supplies and labor from the Norfolk office. We asked the officers of these companies to please let us have their paid receipts, which would have been signed by Mr. Hicks; and these were analyzed and traced to the records. Those which did appear in the records were credited in the report, and those which did not appear in the records were the basis of a compilation of a specific shortage.

* * * * *

129 Q. Now, Mr. Gruber, what were the figures on the specifics, the total figure? A. Approximately $8,650.00.

Q. Do you have a breakdown of the figures on the test period of the payroll hours? A. Yes, sir; 3,333 unaccounted for payroll hours.

Q. And how much is that in terms of money? A. At a so-called retail price of as little as $3.00, this in itself would be in excess of $10,000.

Q. Are you familiar with what the charges were at retail to the customer for labor? A. My recollection is that the charge would have varied between three and four dollars.

Q. An hour per man? A. Yes, sir.

Q. Mr. Gruber, I take you back to sometime in April of 1959 and ask you whether you were present at a conference in my office between Mr. Morrissette and myself and yourself, and a Mr. Martin representing the Insurance Company? A. Yes, sir, I was.

Q. I show you Plaintiff's Exhibit No. 7 and I ask you, sir, whether you ever saw that or a copy of that before? A. Yes. This is the report which we discussed in your office.

130 Q. Prior to that time, what if any written reports had been submitted to the Insurance Company? A. Mr. Morrissette's personnel had submitted a report to the Insurance Company representing the claim of Ace Van & Storage Company.

Q. I show you Plaintiff's Exhibit No. 6 and ask you whether or not that is a copy of the report to which you have reference? A. (Perusing exhibit) Yes, it is.

Q. Now, can you explain to the Court, please, what was the purpose of the preparation and presentation of Exhibit 7 at that meeting in my office with Mr. Martin? A. This is an audit report --

MR. ARNESS: I object, Your Honor. That is not responsive.

THE COURT: What was the purpose of the submission of this report?

THE WITNESS: To show the specific claims accepted, questioned and denied by the Insurance Company.

BY MR. BURKE:

Q. Can you tell us the purpose of the arrangement of that meeting, and who arranged that meeting? A. The meeting was arranged at the request of Mr. Martin. The purpose was to discuss this report.

131 Q. When you say "this report," do you mean Plaintiff's Exhibit 6? A. Plaintiff's Exhibit 7 which, of course, would have related back to Exhibit 6. The meeting was called to discuss the report and to also discuss the items included in it, particularly with regard to those items which were questioned, and those items which were denied.

Q. And wasthe greater portion of that meeting devoted to the discussion of those items? A. Yes, it was.

MR. BURKE: At this time, Your Honor, I would like to once again offer Exhibit No. 7 which Your Honor said to defer until further testimony was given on it, and also Plaintiff's Exhibit No. 9.

MR. ARNESS: Your Honor, I have the same objection I had before to Exhibit No. 7.

THE COURT: That is that this was prepared for use in settlement discussions; is that correct?

MR. ARNESS: Yes, Your Honor. This was prepared after the proof of loss was submitted and the parties got together with reference to trying to reach an amicable adjustment of this case.

MR. BURKE: That is not so, Your Honor. The only purpose of that meeting, as was testified to by both Mr. Morrissette and Mr. Gruber,
132 was to compare the proof of claim which had been filed and to indicate to us where they found items which they rejected and items which they accepted and items which were questionable items. Now, those were the things that were discussed that day. There wasn't any such purpose as a settlement at that time or discussion of a settlement at that time; that didn't come into being until later.

MR. ARNESS: Your Honor, it is obvious that if the proof of loss and the document which is attempted to be introduced here were synonymous, there would be no issue between the parties and, therefore, the matter would have been resolved.

THE COURT: What is the date of Plaintiff's Exhibit No. 7?

MR. BURKE: April, 1960. April 13th, 1960.

THE COURT: Go ahead, Mr. Arness.

MR. ARNESS: Your Honor, I have not had an opportunity to put on testimony yet with reference to that document but I think that on its face when parties that are litigating a matter on a claim pending come forward with different figures in an attempt to thresh them out, that that is part and parcel of the settlement procedures.

THE COURT: The exhibit antedates the filing of the suit by some six months.

133 I will overrule your objection. The Court will admit Plaintiff's Exhibit No. 7 in evidence. Counsel for the defendant may offer such testimony as he deems appropriate to show that the document was by way of a settlement item or statement.

The Court will also admit in evidence Plaintiff's Exhibit No. 9.

(Plaintiff's Exhibits Nos. 7 & 9, for identification, were received into evidence.

THE COURT: Go ahead.

MR. BURKE: Will Your Honor indulge me for just a few minutes?

THE COURT: We will take a short recess at this time.

(Whereupon, at 11:45 a.m., a recess was taken.)

BY MR. BURKE:

Q. Mr. Gruber, subsequent to our meeting with Mr. Martin, were there any later meetings which were attended by you or telephone conversations by you with the representative of the Insurance Company regarding the prospects of a settlement of this claim? A. Yes.

134 Q. Can you tell us approximately where they took place and what were the dates, and whether they were a meeting or a telephone conversation? A. There was a meeting at Mr. Morrissette's office. I can't tell you the exact date; I would guess it would have been perhaps five or six weeks, or maybe even more, prior to my report of May 29th.

Q. That was after the suit was filed? A. Yes, sir.

Q. And were there any other meetings? A. To my knowledge, that is the only meeting that I participated in.

Q. Were there any telephone conversations or discussions either before or after the suit was filed? A. I can't honestly recall any.

Q. Mr. Gruber, from the number of items which were involved in this loss, can you tell us approximately how long the investigations and the researching took before we could arrive at the figures which were listed in Plaintiff's Exhibit No. 6, entitled Proof of Claim? A. I can develop that information specifically from my office time records. Speaking only from my own recollection, I would guess that this had to take a minimum of anywheres from six to possibly ten or more weeks, depending on the timing involved insofar as receipt of correspondence

135 and confirmations from other people. It took a substantial amount of time.

Q. That was after the obtaining of the information?

MR. ARNESS: I object to that as leading the witness, Your Honor.

THE COURT: Your objection is sustained.

BY MR. BURKE:

Q. From what point would that take?

MR. ARNESS: I object. That is a follow-up question, Your Honor, it has already been suggested.

THE COURT: The witness has said six to ten weeks.

MR. BURKE: That is all, Your Honor.

THE COURT: Mr. Arness.

MR. ARNESS: Thank you, Your Honor.

BY MR. BURKE: * * *

174 Q. Mr. Gruber, my question is this: Can you give us an estimate of how long it would have taken Mr. Morrissette and his staff to get any kind of complete information together for the purpose of making a report of some kind? A. This would have run into a very substantial period of time. I would say, because of the problems in gathering the information, getting it out of storage and so forth, probably as much as four months.

C.A. 2471-60

LIBERTY MUTUAL INSURANCE COMPANY
BOSTON, MASSACHUSETTS

CRIME POLICY DECLARATIONS
(Schedule Broad Form A)

C H-03-27434

Item 1 Name of insured Ace Van & Storage Co., Inc.; A. E. M., Inc. t/a Eareckson Carpet Service.

Address 821 Howard Road, S. E., Washington, D. C.
(No. street, town, and state)

Item 2 Business of insured Moving and Storage.

Item 3 Policy Period: From September 21, 1956, to 12:01 A.M. on the effective date of cancelation of the policy, standard time at the address of the insured stated herein as to each of said dates. The anniversary date of this policy shall be the anniversary of the effective date hereof unless otherwise stated herein: ---.

Item 4 The insurance afforded is only with respect to such and so many of the following coverages as are indicated by a specific limit of liability applicable thereto, subject to all the terms of this policy having reference thereto.

	COVERAGES	LIMIT OF LIABILITY
A.	Dishonesty of Employees	$10,000.00
B.	Burglary of Merchandise Within Premises	$1,000.00
C.	Theft of Merchandise Within Premises	$ X
D.	Loss Within Premises	$2,000.00
E.	Loss Outside Premises	$3,000.00
F.	Loss of Payroll Money and Checks	$ X
G.	Safe Deposit Box	$ X
H.	Money Orders and Counterfeit Paper Currency	$ X
I.	Forgery of Issued Instruments	$ X
J.	Forgery of Accepted Instruments	$ X
K.		$
L.		$
M.		$

Item 5 The limit of the company's liability under Coverage A for all loss or losses caused by any employee or in which such employee is concerned or implicated is the amount stated as the limit of liability with respect to Coverage A, irrespective of the total amount of such loss or losses.

CRIME POLICY
(Schedule Broad Form)

LIBERTY MUTUAL
INSURANCE COMPANY
BOSTON, MASSACHUSETTS

(A mutual insurance company, herein called the company)

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I **Coverage A — DISHONESTY OF EMPLOYEES**
To pay for loss, including loss of property, due to any dishonest or fraudulent act committed anywhere by any of the employees, whether acting alone or in collusion with others, whether or not the insured is able to designate the persons causing the loss. A loss due to disappearance of merchandise or inventory shortage is payable only if conclusively proved to be due to a dishonest or fraudulent act committed by an employee.

Coverage B — BURGLARY OF MERCHANDISE WITHIN PREMISES
To pay for: (1) loss from within the premises of merchandise, furnishings, fixtures and equipment caused by burglary or by robbery of a watchman; (2) damage to the premises and to merchandise, furnishings, fixtures and equipment within the premises caused by burglary, robbery of a watchman, or attempt thereat.

Coverage C — THEFT OF MERCHANDISE WITHIN PREMISES
To pay for: (1) loss from within the premises of merchandise, furnishings, fixtures and equipment caused by theft; (2) damage to the premises and to merchandise, furnishings, fixtures and equipment within the premises caused by theft or attempt thereat. A loss due to disappearance of merchandise or to inventory shortage is payable only if conclusively proved to be due to theft.

Coverage D — LOSS WITHIN PREMISES
To pay for: (1) loss of money and securities occurring within the premises or within a night depository in which such money and securities have been deposited by a custodian caused by the actual destruction, disappearance or wrongful abstraction thereof; (2) loss of other property or damage thereto caused by robbery within the premises, or by safe burglary, or attempt thereat, and damage to a locked cash drawer, cash box or cash register caused by felonious entry into such container within the premises, or attempt thereat, or by felonious abstraction of such container from within the premises, and damage to the premises caused by robbery, by safe burglary or by or following burglarious entry into the premises, or attempt thereat; (3) loss of the pay money or pay checks of an employee caused by a felonious and forcible taking thereof from such employee occurring within the premises in the course of a robbery or attempt thereat during the day on which such employee was paid; (4) loss of property from within the premises caused by the wrongful abstraction thereof by one who gains admittance thereinto while such premises are not open for business by compelling a custodian by violence or threat of violence to give admittance, or to furnish information for, or means of gaining admittance, and damage to the premises and to property within the premises resulting therefrom; (5) loss of property caused by the wrongful abstraction thereof from within a show window in the premises, while the premises are open for business, by a person who has broken the glass of such show window from outside the premises, or by an accomplice of such person, and damage to the premises and to property within the premises resulting therefrom.

Coverage E — LOSS OUTSIDE PREMISES
To pay for: (1) loss of money and securities occurring outside the premises caused by the actual destruction, disappearance or wrongful abstraction thereof while in the possession or care of a custodian; (2) loss of other property or damage thereto caused by robbery outside the premises, or attempt thereat.

Coverage F — LOSS OF PAYROLL MONEY AND CHECKS
To pay for: (1) loss of money and checks intended solely for the payroll of the insured occurring within the premises caused by the actual destruction, disappearance or wrongful abstraction thereof; (2) loss of money and checks intended solely for the payroll of the insured occurring outside the premises while in the possession or care of a custodian caused by the actual destruction, disappearance or wrongful abstraction thereof; (3) loss of or damage to the wallet, bag, satchel, safe or chest in which the payroll funds are contained caused by robbery or safe burglary of payroll funds, or attempt thereat, and damage to the premises and to property within the premises, other than money and securities, caused by robbery or safe burglary of payroll funds, or attempt thereat; (4) up to 10% of the limit of liability applicable to this coverage, which 10% shall be part of and not in addition to such limit of liability, loss of money and securities not intended solely for the payroll of the insured occurring outside the premises while in the possession or care of a custodian caused by the actual destruction, disappearance or wrongful abstraction thereof, and loss of or damage to the wallet, bag, satchel, safe or chest in which such money and securities are contained caused by robbery or attempt thereat; (5) loss of the pay money or pay checks of an employee caused by a felonious and forcible taking thereof from such employee occurring within the premises in the course of a robbery or attempt thereat during the day on which such employee was paid.

Coverage G — SAFE DEPOSIT BOX
To pay for loss of securities caused by the actual destruction, disappearance or wrongful abstraction thereof from within any leased safe deposit box in any vault in the premises of the depository, or from within the premises of the depository while such securities are temporarily outside the safe deposit box.

Coverage H — MONEY ORDERS AND COUNTERFEIT PAPER CURRENCY
To pay for: (1) loss caused by the acceptance in good faith, in exchange for merchandise, merchandise and money, services, or services and money, of any post office or ex-

press money order issued or purporting to have been issued by any post office or express company within the United States of America or Canada, if such money order is not paid upon presentation; (2) loss caused by the acceptance in good faith in the regular course of business of counterfeit United States of America or Canadian paper currency.

Coverage I — FORGERY OF ISSUED INSTRUMENTS

To pay for loss due to the forgery or alteration of, on or in any check, draft, promissory note, bill of exchange, or similar written promise, order or direction to pay a sum certain in money, made or drawn by, or drawn upon or as a direction to the insured, or made or drawn by one acting as agent of the insured, or purporting to have been made or drawn as hereinbefore set forth including: (1) any check or draft made or drawn in the name of the insured, payable to a fictitious payee and endorsed in the name of such fictitious payee whether or not such endorsement be a forgery within the law of the place controlling the construction thereof; (2) any check or draft procured in a face to face transaction with the insured, or with one acting as agent of the insured, by any one impersonating another and made or drawn payable to the one so impersonated and endorsed by any one other than the one so impersonated, whether or not such endorsement be a forgery within the law of the place controlling the construction thereof; and (3) any payroll check, payroll draft or payroll order made or drawn by the insured payable to bearer as well as to a named payee and endorsed by any one other than the named payee without authority from such payee, whether or not such endorsement be a forgery within the law of the place controlling the construction thereof.

If provision therefor is made in the insured's proof of loss, the company agrees to indemnify any bank or banks in which the insured maintains a checking or savings account for loss due to any forgery or alteration covered by the preceding paragraph, provided, further, that losses sustained by the insured shall be entitled to priority of payment over losses sustained by such bank or banks, that losses shall be paid directly to the insured in its own name, whether sustained by the insured or by such bank or banks, and that the liability of the company for such loss shall be a part of, and not in addition to, the limit of liability stated in the declarations as applicable to this coverage.

In the event that the insured or the bank or banks shall refuse to pay any instrument hereinbefore specified as covered hereunder, alleging that such instrument is forged or altered, and such refusal shall result in suit being brought against the insured or the bank or banks to enforce such payment and the company shall give its written consent to the defense of such suit, then any legal expenses incurred and paid by the insured or the bank or banks in such defense shall be construed to be a loss under this coverage, and the liability of the company for such loss shall be in addition to the limit of liability stated in the declarations as applicable to this coverage.

Mechanically reproduced facsimile signatures shall be treated the same as handwritten signatures.

Coverage J — FORGERY OF ACCEPTED INSTRUMENTS

To pay for loss due to the forgery or alteration of, on or in any check or draft drawn upon or by any bank, or any check or draft drawn by any corporation upon itself, or any check or similar written order or direction to pay a sum certain in money drawn by any public body upon itself or any warrant drawn by any public body, which the insured shall receive in payment or purported payment for personal property (other than money and securities) sold and delivered or in payment or purported payment for services performed.

The liability of the company with respect to any instrument covered hereunder shall, subject to the applicable limit of liability, be seventy-five per cent of the insured's pecuniary interest in the instrument.

Pecuniary interest shall be:

(1) the amount paid or purportedly paid to the insured for the property sold and delivered or for the services performed, and

(2) the amount of any cash delivered against such instrument, over and above (1) above.

Mechanically reproduced facsimile signatures shall be treated the same as handwritten signatures.

II DEFINITIONS

(a) Burglary The word "burglary" means the wrongful abstraction, while the premises are not open for business, of merchandise, furnishings, fixtures and equipment by any person or persons making felonious entry into the premises by actual force and violence as evidenced by visible marks made by tools, explosives, electricity or chemicals upon, or physical damage to, the exterior of the premises at the place of such entry.

(b) Custodian The word "custodian" means the insured, or any partner or employee of the insured duly authorized to have custody of property, and, with respect to money and securities, any armored motor vehicle company engaged by the insured to transport such money or securities, but, with respect to coverage D does not mean any person while acting as a watchman, porter or janitor.

(c) Employee The word "employee" or "employees" means, respectively, one or more of the natural persons (except directors or trustees of the insured, if a corporation, who are not also officers or employees thereof in some other capacity) while in the regular service of the insured in the ordinary course of the insured's business during the policy period and whom the insured compensates by salary, wages or commissions and has the right to govern and direct in the performance of such service, and who are engaged in such service within the United States of America, Alaska, Hawaii, Puerto Rico, Virgin Islands or Canada, or elsewhere for a limited period, including such persons during a period of thirty days imm[redacted]ely after such persons shall have ceased to be in the regular service of the insured, but does not mean brokers, factors, commission merchants, consignees, contractors, or other agents or representatives of the same general character.

(d) Jewelry The word "jewelry" means jewelry, watches, gems, precious or semi-precious stones and articles containing one or more gems.

(e) Merchandise The word "merchandise" means goods and wares held by the insured for sale and, for the purposes of coverages B and C, includes raw materials, materials in process and articles held for repair or processing.

(f) Money The word "money" means currency, coin, bank notes and bullion.

(g) Premises The word "premises", except as used in the term "premises of the depository", means those portions of the interior of any building which are occupied and controlled solely by the insured in the conduct of the business stated in the declarations. With respect to coverages B and C, premises shall include any showcase or show window used by the insured and located outside the premises but inside the building line of the building containing the premises or attached to said building.

(h) Premises of the Depository The term "premises of the depository" means the interior of that portion of the building which is occupied by a depository of the insured for the purpose of conducting a banking or safe deposit business.

(i) Property The word "property" means money, securities, merchandise, furnishings, equipment or other tangible personal property, and fixtures, real or personal, and also with respect to coverage A, real property.

(j) Robbery The word "robbery", except as used in the term "robbery of a watchman", means a wrongful taking of property from the person, possession or care of a custodian who has been killed or rendered unconscious, or a wrongful taking of property from the person, possession or care of a custodian (1) by force and violence inflicted upon such custodian; (2) by putting such custodian in fear of force and violence; or (3) by any other overt felonious act, not committed by an employee, committed in the presence of such custodian and of which such custodian is cognizant.

(k) Robbery of a Watchman The term "robbery of a watchman" means a wrongful taking, while the premises are not open for business, of property by violence or threat of violence inflicted upon a private watchman employed exclusively by the insured and while such watchman is on duty within the premises.

(l) Safe Burglary The term "safe burglary" means the wrongful abstraction of (1) a safe from within the premises; or (2) property from within a safe or vault located in the premises by any person or persons making felonious entry into such safe or vault when all doors thereof are closed and locked by all combination or time locks thereon; provided that such entry is made by actual force and violence of which there shall be visible marks made upon the exterior of such safe or vault at the point of such entry by tools, explosives, electricity or chemicals.

(m) Securities The word "securities" means negotiable and non-negotiable instruments and contracts representing either money or other property, revenue and other stamps in current use, tokens and tickets, but not including money.

III APPLICATION OF POLICY, DISCOVERY PERIOD, TERRITORY This policy applies only to loss or damage which occurs during the policy period and is discovered prior to the expiration of one year from the earliest of the following dates:

(a) the effective date of cancelation of this policy,
(b) the effective date of cancelation of the applicable coverage,
(c) the effective date of cancelation or termination of the policy as respects the insured sustaining such loss or damage.

Except under coverage A, this policy applies only to loss or damage which occurs within the United States of America, Alaska, Hawaii, Puerto Rico, Virgin Islands or Canada.

EXCLUSIONS

This policy does not apply:

(a) to loss or damage, unless verifiable records, books and accounts are regularly kept by the insured in such manner that the amount of loss or damage can be determined therefrom by the company;
(b) to loss or damage sustained by any bank, trust company, stock-brokerage organization, credit union or any other similar financial institution owned, operated or controlled by, subsidiary to or affiliated with the insured;
(c) to loss resulting from any loan or extension of credit made by the insured or by any of the employees, whether authorized or unauthorized, except when caused by the dishonest or fraudulent acts of any of the employees;
(d) to damage to premises unless (1) such premises are owned by the insured or (2) the insured is liable for such damage;
(e) to loss or damage due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing;
(f) to loss or damage caused by or contributed to by any dishonest, fraudulent or criminal act committed by a partner of the insured, whether acting alone or in collusion with others;
(g) except under coverages A, I and J, to loss of or damage (1) to automobiles, trailers, or semitrailers, or their equipment, (2) unless held by the insured as merchandise, to animals, birds, fish, motor vehicles (other than automobiles, trailers and semitrailers), railroad rolling stock, aircraft or watercraft, or their equipment, or (3) to manuscripts, records, accounts and plate glass or lettering or ornamentation thereon;
(h) except under coverages A, I and J, to loss or damage caused by or contributed to by any dishonest, fraudulent or criminal act committed by any employee, custodian, director or trustee of the insured, whether acting alone or in collusion with others, other than such loss or damage caused by robbery or safe burglary, or attempt thereat;
(i) under coverages B and C, to damage caused by vandalism or malicious mischief, or to loss or damage occurring during a fire in the premises;
(j) under coverages B and C, to loss of or damage to furs and articles containing fur which represents their principal value caused by the wrongful abstraction thereof from within a showcase or a show window, by a person who has broken the glass thereof from outside the premises, or by an accomplice of such person;
(k) under coverage C, to loss or damage for which insurance is or can be afforded under coverage B;
(l) under coverage C, to loss or damage caused by or contributed to by the giving or surrendering of title to or possession of merchandise, furnishings, fixtures or equipment by the insured or by any other person acting under the express or implied authority of the insured if such giving or surrendering is induced by any fraudulent scheme, trick, device or false pretense;
(m) under coverages B and C, to loss of or damage to property or premises, by fire;
(n) under coverages D, E, F and G, to loss of or damage to property, other than money and securities, or premises, by fire;
(o) under coverages C, D, E, F and G, to loss caused by (1) forgery by whomsoever committed, (2) the giving or surrendering of money or securities in any exchange or purchase, or (3) accounting or arithmetical errors or omissions;
(p) under coverages D, E and F, to loss of or damage to property while in the custody of any armored motor vehicle company, unless such loss or damage (1) is caused by safe burglary, robbery, theft or attempt thereat, and (2) is in excess of the total amount recovered or recoverable by the insured under (a) a contract with such armored motor vehicle company, and (b) insurance carried by such armored motor vehicle company for the benefit of users of its service, and (c) any other insurance or indemnity carried by or for the benefit of users of such armored motor vehicle company's service, and then this policy shall apply only to such excess;
(q) under coverage D, to loss of money contained in coin operated amusement devices and vending machines, unless the amount of money deposited within the device or machine is recorded by a continuous recording

instrument therein.

(r) under coverages I and J, to loss due to forgery or alteration of, on or in: post office or express money orders; registered or coupon obligations or coupons attached thereto or detached therefrom; or any instrument received by the insured in purported payment for property previously sold and delivered on credit.

CONDITIONS

1 **PREMIUMS** The premium bases, rates, rating plans, premiums and minimum premiums applicable to this policy are each subject to change as of each anniversary date of this policy in accordance with the manuals in use by the company.

2 **LIMIT OF LIABILITY, SETTLEMENT OPTIONS** The limit of the company's liability under coverage A shall not exceed the actual cash value of the property at the time of loss, nor what it would then cost to repair or replace the property with other of like kind or quality, nor the limit of liability as stated in Item 5 of the declarations.

The limit of the company's liability under coverages I and J, for all loss or losses by forgery or alteration committed by any person or in which such person is concerned or implicated, whether such forgery or alteration involves one or more instruments, is the amount stated in the policy as the limit of liability with respect to each such individual coverage, irrespective of the total amount of such loss or losses.

The limit of the company's liability under each coverage afforded by this policy, other than coverages A, I and J, for all loss and damage resulting from any one casualty or event shall not exceed the actual cash value of the property at the time of loss or damage, nor what it would then cost to repair or replace the property with other of like kind and quality, nor the applicable limit of liability stated in the declarations; provided, the limit of the company's liability under coverages B and C for loss of or damage to any one article of jewelry is $50; provided, further, the limit of the company's liability under coverages B and C for loss of or damage to the contents of any showcase or show window not opening directly into the interior of the premises is $100.

The actual cash value of any securities shall be the actual market value of such securities at the close of business on the business day next preceding the day on which the loss was discovered, or in the case of subscription, conversion, redemption or deposit privileges, the value of such privileges immediately preceding the expiration thereof. If such securities have no quoted market value and the value cannot be established, it may be determined by agreement.

The company may repair any damage or replace any lost or damaged property with other of like kind and quality or pay for such loss or damage in money as the company may elect. Any such property paid for or replaced shall become the property of the company.

The company may adjust any claim with the insured or, if the insured and the company agree, with the owner of the property. Payment of any claim to such owner shall constitute full satisfaction of such claim by the insured. If legal proceedings are taken against the insured to recover for any loss or damage, the insured shall immediately notify the company in writing, and the company, at its own expense, may conduct and control the defense in the name of and on behalf of the insured.

The amount of any loss or damage sustained in a country other than the United States of America shall be computed, as of the date of discovery of such loss or damage, in the currency of the United States of America, and the amount so computed shall be paid in the currency of the United States of America or, at the option of the insured, in the currency of such other country at the rate of exchange prevailing on the date of payment.

The inclusion herein of more than one insured or interest shall not operate to increase the limits of the company's liability.

3 **JOINT INSUREDS** If more than one insured is named in the declarations, the insured first named therein shall act not only for himself but also for each and all of the insureds with respect to all matters relating to the insurance afforded under this policy, including giving of notice of loss, proof of loss, filing of suit, giving and receiving of notice of cancelation, payment of premiums, settlement and adjustment of claims, and the receiving of return premiums, if any, and such dividends as may be declared by the company. Any payment by the company to such first named insured shall fully discharge, to the extent of the amount so paid, all liability of the company with respect thereto.

Knowledge possessed or discovery made by any insured or by any partner or officer thereof shall constitute knowledge possessed or discovery made by all of the insureds.

4 **OWNERSHIP OF PROPERTY; INTERESTS COVERED** The insured property may be owned by the insured or held by him in any capacity or may be property as respects which the insured is legally liable; provided, the insurance applies only to the interest of the insured in such property, including the insured's liability to others, and does not apply to the interest of any other person or organization in any of said property unless included in the insured's proof of loss.

5 **MERGER, CONSOLIDATION OR ACQUISITION** If any concern or interest is merged or consolidated with or acquired by the insured and as a consequence thereof the exposure to the hazards insured hereunder is increased, such insurance as is afforded by the policy shall also apply with respect to such increased exposure, provided the insured shall give the company written notice thereof within thirty days thereafter and shall pay the company an additional premium based upon such increased exposure computed pro rata from the date of such merger, consolidation or acquisition.

6 **INSPECTION AND RECORDS** The company shall be permitted to inspect the premises and to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within three years after the final termination of this policy, as far as they relate to the premium bases or the subject matter of this insurance.

If insurance is provided under coverage G, the insured shall, for the purpose of determining if any securities are missing from the safe deposit box or boxes, examine the securities at least annually, and shall keep an accurate record of each such examination.

7 **INSURED'S DUTIES WHEN LOSS OCCURS** Upon the discovery by the insured of any loss or damage, the insured shall:

(a) give written notice thereof as soon as practicable to the company or any of its authorized agents and, with respect to loss or damage under coverages B, C, D, E, F, G or H, if such loss or damage is due to a violation of law, also to the police;

(b) file proof of loss with the company within ninety days after the discovery of loss or damage, unless such time is extended in writing by the company, in the form and manner required by the company.

Upon the company's request, the insured and every claimant hereunder shall submit to examination by the company, subscribe the same, under oath if required, and produce for the company's examination all pertinent records, all at such reasonable times and places as the company shall designate, and shall cooperate with the company in all m

ters pertaining to loss or damage [redacted]laims with respect thereto.

In the event of loss or damage for which claim is made, the insured shall, if the company shall so request in writing, take legal action to secure recovery of the property and the arrest and prosecution of the offenders. The company shall, in addition to the applicable limit of liability of this policy, reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's written request.

8 **APPRAISAL** If the insured and the company fail to agree as to the actual cash value or repair or replacement cost of any lost or damaged property, each shall, on the written demand of either, made within sixty days after receipt of proof of loss by the company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request of the insured or the company, such umpire shall be selected by a judge of a court of record in the county and state in which such appraisal is pending. The appraisers shall then determine the actual cash value or repair or replacement cost and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the actual cash value or repair or replacement cost. The insured and the company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The company shall not be held to have waived any of its rights by any act relating to appraisal.

9 **ACTION AGAINST COMPANY** No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until ninety days after the required proofs of loss have been filed with the company, nor at all unless commenced within two years from the discovery of the loss or damage. If this limitation of time is shorter than that prescribed by any statute controlling the construction of this policy, the shortest permissible statutory limitation in time shall govern and shall supersede the time limitation herein stated.

10 **OTHER INSURANCE** If any loss or damage hereunder is covered under both coverage A and coverage I, such loss or damage shall first be paid under coverage I, and the excess, if any, shall be paid under coverage A. The company waives any right of contribution which it may have against any forgery insurance carried by any depository bank which is indemnified under coverage I.

If there is any other valid and collectible insurance which would apply in the absence of this policy, the insurance under this policy shall apply only as excess insurance over such other insurance; provided, the insurance shall not apply to property otherwise insured unless such property is owned by the insured.

11 **NO BENEFIT TO BAILEE** The insurance afforded by this policy shall not inure directly or indirectly to the benefit of any carrier or bailee.

12 **SUBROGATION; SALVAGE** In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

Any recovery from any source, other than insurance, reinsurance or suretyship, on account of loss or damage due to any of the hazards insured hereunder, whether made before or after payment, and whether made by the company or by the insured, shall be applied in reduction of such loss or damage as if [redacted]before payment by the company.

The insured an[redacted]e company shall bear all recovery expenses proportionately to the share of any recovery each shall receive.

13 **CHANGES** Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the President or a Vice President and the Secretary or an Assistant Secretary of the company and, if such signatures are facsimile signatures, countersigned by a duly authorized representative of the company.

14 **ASSIGNMENT** Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the insured shall die and written notice is given to the company within sixty days after the date of such death, this policy shall cover the insured's legal representative as insured; provided that notice of cancelation addressed to the insured named in the declarations and mailed to the address shown in this policy shall be sufficient notice to effect cancelation of this policy.

15 **CANCELATION** This policy may be canceled by the insured by mailing to the company written notice stating when thereafter the cancelation shall be effective. This policy may be canceled by the company by mailing to the insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the insured or by the company shall be equivalent to mailing.

If the insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancelation is effected or as soon as practicable after cancelation becomes effective, but payment or tender of unearned premium is not a condition of cancelation.

This policy shall be deemed terminated as to any employee (a) as soon as the insured, or, if the insured is a corporation, any officer thereof not in collusion with such employee, shall learn of any dishonest or fraudulent act on the part of such employee while in the service of the insured or otherwise, but without prejudice to the loss of any property then in transit in the custody of such employee, or (b) upon the effective date specified in a written notice mailed to the insured at the address shown in this policy. Such date shall be not less than twenty days after the date of mailing. Delivery of such written notice by the company shall be equivalent to mailing.

16 **PRIOR FRAUD, DISHONESTY OR TERMINATION** Unless the company shall otherwise agree in writing, this policy shall not become effective as to any employee who, within the knowledge of the insured or any partner or officer thereof not in collusion with such employee, has committed any fraudulent or dishonest act in the service of the insured or otherwise.

If, prior to the issuance of this policy, any fidelity insurance in favor of the insured or any predecessor in interest of the insured and covering one or more of the insured's employees shall have been canceled as to any of such employees by reason of (a) the discovery of any fraudulent or dishonest act on the part of such employees, or (b) the giving of written notice of cancelation or termination by the insurer issuing such fidelity insurance, whether the company or not, and if such employees shall not have been re-

instated under the coverage of said fidelity insurance or superseding fidelity insurance, the company shall not be liable under this policy on account of such employees unless the company shall agree in writing to include such employees within the coverage of this policy.

17 **DECLARATIONS** By the acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

MUTUAL POLICY CONDITIONS This policy is non-assessable. The policyholder is a member of the company and shall participate to the extent and upon the conditions fixed and determined by the board of directors in accordance with the provisions of law, in the distribution of dividends so fixed and determined. 1

In witness whereof, the company has caused this policy to be signed by its President and its Secretary at Boston, Massachusetts, and countersigned by a duly authorized representative of the company.

George A. Potter
SECRETARY

Bryan Smith
PRESIDENT

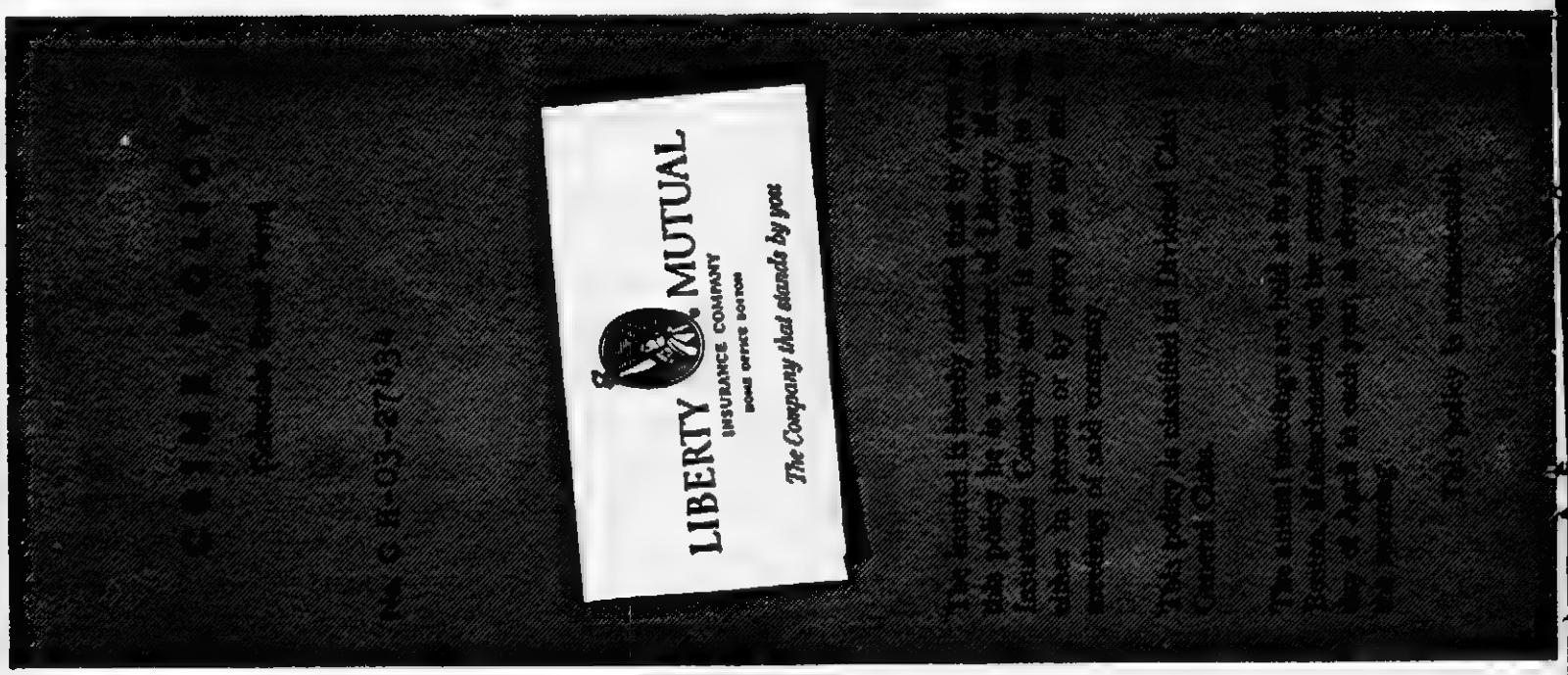
The policy, including all endorsements issued therewith, is hereby countersigned by

G. B. Griffith
AUTHORIZED REPRESENTATIVE

SHORT RATE CANCELATION TABLE

For Term of One Year

Days Policy in Force	Per Cent of One Year Premium	Days Policy in Force	Per Cent of One Year Premium
1	5	154–156	53
2	6	157–160	54
3– 4	7	161–164	55
5– 6	8	165–167	56
7– 8	9	168–171	57
9– 10	10	172–175	58
11– 12	11	176–178	59
13– 14	12	179–182 (6 mos.)	60
15– 16	13	183–187	61
17– 18	14	188–191	62
19– 20	15	192–196	63
21– 22	16	197–200	64
23– 25	17	201–205	65
26– 29	18	206–209	66
30– 32 (1 mo.)	19	210–214 (7 mos.)	67
33– 36	20	215–218	68
37– 40	21	219–223	69
41– 43	22	224–228	70
44– 47	23	229–232	71
48– 51	24	233–237	72
52– 54	25	238–241	73
55– 58	26	242–246 (8 mos.)	74
59– 62 (2 mos.)	27	247–250	75
63– 65	28	251–255	76
66– 69	29	256–260	77
70– 73	30	261–264	78
74– 76	31	265–269	79
77– 80	32	270–273 (9 mos.)	80
81– 83	33	274–278	81
84– 87	34	279–282	82
88– 91 (3 mos.)	35	283–287	83
92– 94	36	288–291	84
95– 98	37	292–296	85
99–102	38	297–301	86
103–106	39	302–305 (10 mos.)	87
106–109	40	306–310	88
110–113	41	311–314	89
114–116	42	315–319	90
117–120	43	320–323	91
121–124 (4 mos.)	44	324–328	92
125–127	45	329–332	93
128–131	46	333–337 (11 mos.)	94
132–135	47	338–342	95
136–138	48	343–346	96
139–142	49	347–351	97
143–146	50	352–355	98
147–149	51	356–360	99
150–153 (5 mos.)	52	361–365 (12 mos.)	100



PLAINTIFF'S EXHIBIT NO. 2

MEMO OF THE CONFERENCE HELD WITH FREDERICK A. GRIER REPRESENTING LIBERTY MUTUAL INSURANCE COMPANY, FRIDAY, OCTOBER 9, 1959

A conference was held at the office of David M. Gruber, accountants for Ace Van and Storage Company, Inc. on Friday, October 9, 1959, commencing at 2 p.m. which was attended by the following: Mr. Arthur E. Morrissette, President of and representing Ace Van and Storage Company, Inc., Mr. Milton M. Burke, counselor for Ace Van and Storage Company, Inc., David M. Gruber, auditor for Ace Van and Storage Company, Inc., and Frederick A. Grier, representing Liberty Mutual Insurance Company.

The purpose of this conference was to discuss the discovery of apparent discrepancies and/or shortages at the Norfolk, Virginia office of the Ace Van and Storage Company, Inc. under the direction of Gaylord J. Hicks.

The following procedure was agreed upon:

1. Without opposition from the Liberty Mutual Insurance Company, acting through Mr. Grier, the employment of Mr. Hicks will be terminated effective Saturday morning, October 10, 1959. Mr. Morrissette will meet a representative of Liberty Mutual at the Norfolk office of Ace Van & Storage Company, Inc. for the purposes of preliminary investigation at which time Mr. Hicks will be discharged.

2. Whatever information and material was available to the representative of Ace Van & Storage Company, Inc. was reviewed with Mr. Grier and some copies of some of the documents were either delivered or will be delivered in the future to him or to the Norfolk Virginia office of Liberty Mutual.

3. The representative of Ace Van & Storage Company, Inc. and of Liberty Mutual Insurance Company will continue the investigation to as prompt a disposition of this matter as is reasonably possible.

/s/ Arthur E. Morrissette
/s/ Frederick A. Grier

2471-60

Pl's. Ex. ~~for ID.~~ 109 CO 2471-60 Norfolk, Va. October 10, 1957 11:15 AM.

I am Gayland J. Hicks, Jr. I am 27 years old, married, and live at 5530 Macon Court in Norfolk Virginia. I have two children. I am manager of Ace Van and Storage Company. I began working for Ace Van and Storage on January 15, 1958. I had been previously employed by Shamrock Van Lines, Inc. I worked at Shamrock approximately one year. After coming with Ace Van and Storage in January, I began with holding collections in approximately March of 1958. I felt that if I could cut down on the bills the company was incurring in Norfolk, that Mr. Morissette would take note that I was doing what I said I could do. When I interviewed for the manager's job I had told Mr. Morissette that I could and would cut the bills and expenses down. All storage accounts must be paid in cash. I began taking this money and paying company bills recieved in the Norfolk office. The money should have been deposited in the National Bank of Commerce. Bills are normally verified and customed in the Norfolk office and then sent to our Washington D C office, where payment of the bills is made to the firms owed. When an account first came with this office for storage, Washington D.C. office was notified. Both offices had records of these storage accounts. When payment was made on these storage accounts I would not notify the Washington D.C. office. As far as these records went the storage accounts would remain accounts recievable. I would make a payment

Mrs. Jacqueline O. Morissette — Gayland J. Hicks

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records in the Norfolk office. The storage account would be building up into larger figures according to Washington D.C.'s records. As the months passed it became impossible to make payments. I would send partial payments when possible so that the accounts would not be declared bad debts and auctions held. The auctions are overseen by the home office of Ace in Washington D.C. The above procedure continued and got more mixed up as the months passed. I wanted out of the situation but I had to much money to account for that I couldn't come up with. The only thing I could do was swap the companies money in the banks. In April of 1959 I began cashing government checks which came into the office. We had a government contract and I had signed the contract. It was for local moves within a thirty mile radius of Norfolk. As I had signed the contract the fact that I signed or rather endorsed the checks was not questioned. It was very rare that any other checks other than the government checks came into the Norfolk office. The bank did not question my signing the checks Ace Van and Storage, Inc and then my name. The cashing of the government checks was just to keep covering up. There were from 10 to 15 checks endorsed, may be more. The procedure with the storage accounts and government checks continued until I endorsed the last government check around Oct 1, 1959 and stopped taking the storage accounts.

Mrs. Jacqueline D. Mauricette

Lloyd F. Mabe

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about April or May of 1959. I figured that the Washington Office should get some of the accounts coming in so I started keeping the new accounts straight. I was going to try to get the old accounts straightened out one at a time. Finally on October 4, 1959 I called Mr. Morrisette and asked him to come to Norfolk. I told him that I wanted to talk with him pertaining to a shortage in the accounts. On Monday I was told to come to Washington D.C. I spoke with Mr. Morrisette and Mr. David Graeber in the accounts office I carried what records were available with me and gave them to Mr. Graeber. In my own mind I had used the money for the companies benefit even though I realize now that I was morally wrong. The only times I used the money I had to cover my bills over a short period of time. In many instances I would use the ace money for short periods of time. I would hold the money until I got my paycheck. ~~May be~~ I would take the checks and cash them with the intention of paying Ace Van and Storage bills and not my own. If I had taken the money for my own financial gain I would have something to show for it. I rent, I have three different furniture payments, 3 personal loan payments, and various other payments. The only thing I actually own are my family clothes and a refrigator. I feel that the amount of money

Mrs. Jacqueline O. Morrisette Gaylord F. Hicks

Page 4

F35-409

involved in the shortage is between two and three thousand dollars. Of course I do not remember the exact amount of money involved. I kept a little book record of the shortages at first, but I became leerie of that and burned the book. I feel that the exact amount of money shortage after the auditors finish with the records will not be money that I have since I used the money for the company. However, I realize that I am the cause and I am willing to make restitution I can borrow money, but I can't know the amount involved here. I will be agreeable to trying to work out some solution to the problem of repaying the shortage.

I have read the above 3½ pages & understand them, and they are true.

Gaylord J. Hicks Jr.

Mrs. Jacqueline D. Marinaccio

PLAINTIFF"S EXHIBIT NO. 4

REPORT OF SPECIAL EXAMINATION
ACE VAN AND STORAGE COMPANY, INCORPORATED
Norfolk, Virginia

EDMONDSON, LEDBETTER &BALLARD
Certified Public Accountants
Norfolk 10, Virginia

December 30, 1959

HONORABLE LINWOOD B. TABB
COMMONWEALTH'S ATTORNEY
300 ESSEX BUILDING
NORFOLK, VIRGINIA

Dear Mr. Tabb:

At the request of Mr. A. E. Morrisette, President of Ace Van and Storage Company, Incorporated, we have examined records of cash received and certain other records and correspondence that pertain to operations of this firm's Norfolk office during the period from January 10, 1958 through October 10, 1959.

Our examination was conducted for the purpose of determining amounts misappropriated during the period Gaylord J. Hicks, Jr., was employed as manager of the Norfolk operations of Ace Van and Storage Company, Incorporated, whose home office is located at 821 Howard Road., S. E., Washington, D. C. Results of our examination are set forth in the following paragraphs.

Gaylord J. Hicks, Jr. was employed by Ace on January 10, 1958 and remained in its employ until October 10, 1959, on which date he was discharged. His duties as manager of the Norfolk office included the responsibility for scheduling work, billing for services rendered, collection of amounts due, deposit of collections received for Ace Van and forwarding

Plaintiff's Exhibit No. 4 (Cont'd.)

of information on billings and collections to the Washington office daily or currently.

Records and information indicate that Mr. Hicks began the mishandling and incorrect recording of funds received shortly after the beginning of his employment and continued the practice until the day before his discharge. Information obtained from records and correspondence with customers and others indicates that during this period at least $8,961.22 was paid to the order of Ace Van and Storage Company, Incorporated, or to Mr. Hicks for Ace Van and Storage, but was not deposited to the credit of Ace Van as was required by prescribed duties.

We have arrived at this amount in the following manner:

Charges for services rendered nineteen different individuals and firms beginning in March of 1958 and continuing to October, 1959 for which various amounts were paid but not deposited to the account of Ace Van total	$1,322.96
Statements of charges for services rendered and/or products sold to American Van and Storage, Incorporated of Miami, Florida, as furnished by American, indicate that American paid to Mr. Hicks during 1958 and 1959 various amounts Ace has no record of having received which total	1,618.29
Similar amounts paid by Richardson Transfer and Storage of Salina, Kansas, during the same period total	2,347.41
Similar amounts paid by Shawmut Van Lines, Incorporated of Boston, Massachusetts, during 1959 total	554.35
Photo copies of thirty checks issued by the U.S. Government during the latter part of 1958 and for the first nine months of 1959, payable to the order of Ace Van and Storage Company, indicate they were negotiated by Mr. Hicks and we find no evidence that any of these amounts were deposited to the account of Ace Van and Storage. These checks total	3,108.21
	$8,961.22

Plaintiff's Exhibit No. 4 (Cont'd.)

During March and subsequent months of 1958 and during 1959 Mr. Hicks delivered or caused to have delivered the property of certain customers that had been stored in the Norfolk warehouse of Ace Van and Storage. Correspondence with these customers indicates that delivery charges and the storage charges due Ace Van at delivery date were paid. However, in numerous instances records of such collections were not forwarded to the Washington office nor were proceeds deposited in the Norfolk bank account. In some cases an amount less than the amount collected was deposited in the bank account and a record of the lesser amount was mailed to Washington. Charges for storage would continue to be entered monthly on the account cards of these customers so that the cards would indicate that the furniture remained in storage when in reality it had been delivered out of storage.

Replies received from numerous individuals listed on daily dispatch or schedule sheets indicated that services had been performed for various customers and charges collected therefor, but the amounts had been retained by Mr. Hicks without the knowledge of Mr. Morrisette or other employees of Ace. Such replies from customers revealed that charges collected for storage and other local moves, totaling at least $1,332.96, were never deposited to the account of Ace Van and Storage. It would be difficult to determine the total dollar volume handled in this manner because many of the customers failed to reply to the request for information about their moves and because many are not now in the Norfolk area.

The earliest misappropriation we noted during our examination occurred on January 30, 1958, and involved a payment for labor furnished by Ace to another moving firm. Because it is typical of the procedure followed for a number of misappropriations we will describe it in some detail.

Plaintiff's Exhibit No. 4 (Cont'd.)

On January 30, 1958, Ace Van and Storage furnished labor to American Van and Storage of Miami, Florida, for loading goods for shipment via American Van. A charge of $10.00 for these services was written-up on the green copy of "foreman's ticket" number 1933. (The green copies of foreman's tickets are the customers' copies.) The white (office copy) of foreman's ticket number 1933 was so written that a charge of only $6.00 was indicated for the service. This white copy was forwarded to the Washington office of Ace Van. A deposit was made with the Merchants and Planters Bank (now National Bank of Commerce) for the credit of Ace Van and Storage Co., Inc. that indicated $6.00 was included as a part of the currency and that it had been received from American Van. The foreman's tickets bore the signature "G. J. Hicks, Jr.". This procedure was repeated on different occasions during the first three or four months of Mr. Hicks' employ.

During March and April of 1958, labor and other services furnished American Van were written-up on unnumbered invoice forms and such records were never forwarded to the Washington office of Ace Van. In each month from July, 1958 through September, 1959 it appears that almost all charges to American Van were written-up on unnumbered invoice forms. We found no evidence that these amounts were reported to Ace's Washington office, nor that funds collected for these services were deposited to the credit of Ace. Certain amounts collected from American Van were recorded properly and deposited in the prescribed manner and these amounts are not included in the total of $1,618.29 set forth in this report.

Procedures of a similar nature were used insofar as the handling of amounts paid by Richardson Transfer and Storage during 1958 and 1959 and Shawmut Van Lines during 1959. At the date of this report, we do not have information concerning amounts paid by Shawmut during 1958.

Plaintiff's Exhibit No. 4 (Cont'd.)

During the latter part of 1958 and 1959, thirty checks of various amounts were issued by the U. S. Government to the order of Ace Van and Storage in payment for services rendered. We were unable to find any of these amounts recorded as having been received by Ace's Norfolk office nor could we find where such amounts had been deposited to the credit of Ace Van and Storage with its Norfolk bank.

Photo copies of these checks indicate that they were endorsed by writing or printing "Ace Van and Storage Company" (or some variation thereof) on the reverse side of the check and with the additional endorsement "Gaylord J. Hicks" or "G. J. Hicks." The imprint of tellers' stamps on the face of these checks indicates that they were cashed at the Lafayette Boulevard Branch of the National Bank of Commerce of Norfolk, Virginia. The total of these checks amounted to $3,108.21.

We reviewed briefly, transactions in Mr. Hicks' personal bank account with the Lafayette Boulevard Branch of the National Bank of Commerce for the period of his employment, except for disbursements made during the last three and one-half weeks. We noted that during the entire period of his employment deposits recorded in his account totaled $13,410.90. From the payroll records of Ace Van, we determined that the net amount of his payroll checks during this same period totaled $8,190.13, which indicates deposits from other sources of no less than $5,220.77. It appears that currency and coin amounted to approximately $3,600.00 of the amount deposited from other sources. Of disbursements made from Mr. Hicks' personal account that were available for our analysis, checks drawn in amounts aggregating approximately $1,350.00 bear notations on the face of them indicating that they were for the account of Ace Van and Storage Company. Mr. Morrisette informed us that none of these amounts were in payment of authorized Ace Van bills.

Plaintiff's Exhibit No. 4 (Cont'd.)

As stated previously in this report, we believe at least $8,961.22 has been misappropriated. We are of the opinion that the total loss of Ace Van and Storage will exceed this amount. We had a limited amount of time within which to perform our work. In that time we could not and did not perform a detailed audit of all Norfolk transactions. Information obtained indicates that records of transactions were intentionally altered and/or omitted to such an extent that it would be most difficult and exceedingly expensive to reconstruct the records of all Norfolk transactions. Preliminary investigation of several transactions that appear to be improperly handled indicates that additional shortages will be revealed subsequent to the date of this report.

Respectfully submitted,

EDMONDSON, LEDBETTER & BALLARD

By

Vernon N. Winquist

Fdco 7344

2471-60

LIBERTY MUTUAL INSURANCE COMPANY
We work to keep you safe

PL'S. EX. 6

C.A. 2471-60

PROOF OF LOSS

FILED

NOV 19 1963

FILE NO. FD 60 7344

HARRY M. HULL, Clerk

Ace Van & Storage Company, Inc.

presents claim for $ 15,252.62 for loss resulting from default under Bond No. CR-03-27h3k,

in the amount of $ 10,000.00 on behalf of Gaylord J. Hicks (Employee)

employed in the position of Manager at Norfolk, Virginia (City) (State)

DETAILED STATEMENT OF CLAIM

DATE		DESCRIPTION OF ITEM	AMOUNT	
1/30/	60	1. Proceeds from Commercial Local Moves Not Remitted to D. C.	$2012	77
"	"	2. Proceeds from Storage Accounts Not Remitted to D. C.	338	00
"	"	3. Proceeds from Sale of Labor and Gasoline Not Remitted to D. C.	h729	71
"	"	h. Proceeds from Interstate Shipments Not Remitted to D. C.	837	83
"	"	5. Personal Moves and Services Not Authorized by D. C.	165	00
"	"	6. Personal Telephone Calls.	5	00
"	"	7. Proceeds from IntraState Moves Not Remitted to D. C.	88	00
"	"	8. Purchases for Personal Benefit charged to Ace Accounts.	h05h	38
"	"	9. Missing Ace Property as per Inventory.	268h	18
"	"	10. Proceeds from Packing and Crating Not Remitted to D. C.	20	50
"	"	11. Miscellaneous Collections Not Remitted to D. C.	17	25
"	"	12. Unremitted Auctioneer Receipts(Gornto)	300	00
		TOTAL CHARGES	$15,252	62
		Credits Items		
		By Salary:		
		Securities, notes, etc.:		
		TOTAL CREDITS	—	
		NET LOSS	$15,252	62

RECEIVED
WASHINGTON
FEB 2 1960

ASC 960 Rev.

(Over)

State of
County of } ss.

The undersigned, Arthur E. Morrissette, being first duly sworn, states that he is President of Ace Van & Storage Company, Inc. (Employer), that the above statement is true and correct in every respect, that the items charged to Gaylord J. Hicks (Employee) on the dates and in the amounts set forth have not been paid over to the said Employer but have been fraudulently misappropriated by the said Employee to His own use with the intent to deprive the said Employer of the same, that said misappropriation was first discovered on October 9, 1959 by Myself, that there are no offsets whatever against said claim, for salary, commissions and other credits other than as set forth in the above statement, that the said Employer has fully complied with all the conditions of the bond issued by the Liberty Mutual Insurance Company on behalf of said Employee and that the said Employer has not accepted any security for or on account of same except as set forth herein.

Further the deponent says that the said Employee has been continuously in the employ of said Employer for the period beginning January 1h, 1958 and ending October 9, 1959, the employment having been discontinued by reason of Discharge By Employer

Arthur E. Morrissette
(Signature)

On this 1st day of February, 19 60, personally appeared Arthur E. Morrissette, President of the Ace Van & Storage Company, Inc., to me known to be the person who executed the foregoing endorsement, and who duly acknowledged that he had executed the same in said capacity and that the foregoing instrument is his free act and deed and the free act and deed of said corporation.

Before me, [illegible]
NOTARY PUBLIC.

Pretrial Exhibit
D #1 EB
Assistant [illegible]

INSTRUCTIONS FOR MAKING PROOF

Statement of loss should be an itemized account showing names, dates, amounts, and description of individual items, of money, securities or property, misappropriated, stolen, or embezzled, as nearly as can be ascertained, and if representing collections made, the dates, names, and addresses of the persons, firms, or corporations from which the collections were made.

Credits should be similarly entered in detail, as to commissions or salary due and unpaid and any securities, notes, etc., should be listed individually with full description.

Attach to proof all original vouchers, if possible, otherwise verified copies of same and any further evidence in explanation or support of the amount or amounts for which claim is made.

If other security, indemnity, or surety against loss is held, list the amounts, names, and addresses of the indemnitors or sureties, with full description of same.

If this claim is made by a corporation, an officer of the corporation must sign this Proof of Loss.

[Filed Nov. 19, 1963]

PLAINTIFF'S EXHIBIT NO. 7

Bala-Cynwyd Auditing
April 13, 1960

H. O. AUDITING
R. P. Allen

ACE VAN & STORAGE CO., INC. — WASHINGTON, D.C. F 35-409
Branch Storage Office — Norfolk, Va. FD 60-7244

At the request of H. O. Claims an audit was made of insured's books and records to determine the amount of the fidelity claim submitted by the insured in their Proof of Loss, dated February 1, 1960 in the amount of $15,252.62. The principal shown in the Proof of Loss is Gaylord J. Hicks, employed as moving and storage manager at their terminal in Norfolk, Virginia. Audit of insured's records pertaining to the claim was made at their Washington, D.C. office.

Persons Contacted:

Mr. Arthur E. Morrissette — President
Mr. David M. Gruber — Insured's CPA

Coverage:

Insured's present fidelity coverage is under policy CH 1031-908097-29 for period 9/21/59 to 9/21/62 with Dishonesty of Employees limits of $10,000. Prior coverage was under policy CH 03-27434 for period 9/21/56 to 9/21/59 with Dishonesty of Employees limits of $10,000.

Insured's Operations:

Insured operates a storage and local hauling van service. They may move the household goods of a customer from one location to another, or move the contents to their warehouse for storage, or crate it for more distant shipment. In conjunction with long distance hauler they may furnish labor at either their Washington or Norfolk, Virginia locations to assist in loading or unloading van lines.

Plaintiff's Exhibit No. 7 (Cont'd.)

At their Washington warehouse they also have a rug cleaning, shampooing, and storage business for their customers.

Nature of Loss:

The principal, Gaylord J. Hicks, Jr. was employed, according to a copy of the bonding questionnaire in insured's file, on January 15, 1958 as the manager of their Norfolk, Virginia office where local moving and storage operations are carried on. According to the principal's signed statement, dated 10/10/59 he says he started withholding collections in approximately March of 1958 (2 to 3 months after he was employed).

He says that he felt that if he could cut down on the bills the company was incurring in Norfolk, that Mr. Morrissette (President) would take note that he was doing what he said he could do. He says that when he was interviewed for the manager's job he had told Mr. Morrissette that he could and would cut the bills and expenses down. He says all storage accounts must be paid in cash. He said he began taking this money and paying company bills received in the Norfolk office. He says the money should have been deposited in the National Bank of Commerce.

He further states that when an account first came into this office (Norfolk) for storage the Washington, D.C. office was notified. Both offices had records of these storage accounts. When payment was made on these storage accounts he would not notify the Washington, D.C. office. As far as their records went the storage accounts would remain an (open) account receivable. He says he would make a payment notation on the records in the Norfolk office. The storage account would be building up into larger figures according to Washington, D.C.'s records. As the months passed it became impossible to make up payments and he says he sent partial payments when possible so that the accounts would not be declared bad debts and auctions held (of the furniture). The auctions are overseen

Plaintiff's Exhibit No. 7 (Cont'd.)

by the Home Office, Washington, D.C. The above procedure continued and got more mixed up as the months passed. He stated he "wanted out" of the situation, but he had too much money to account for which he could not come up with. He says the only thing he could do was swap the company's money on the banks.

In April 1959 he began cashing government checks which came into the office. They had a government contract and he had signed the contract. It was for local moves within a thirty mile radius of Norfolk. As he had signed the contract the fact that he signed or rather endorsed the checks was not questioned. (Actually he endorsed with his hand signature, government checks made payable to Ace Van & Storage Co. and cashed them at the National Bank of Commerce, Norfolk, Virginia.) He states that the bank did not question his signing the checks of Ace Van & Storage, Inc. and then his name. The cashing of the government checks was just to keep covering up. There were from 10 to 15 checks involved, maybe more, he says.

The procedure with the storage accounts and government checks continued until he endorsed the last government check around October 1, 1959 and stopped taking the storage accounts (payments) about April or May 1959. He says he figured that the Washington office should see some of the accounts coming in so he started keeping the new accounts straight. He says he was going to try to get the old accounts straightened out one at a time. Finally, on October 4, 1959, he called Mr. Morrissette, President, and asked him to come to Norfolk. He told him that he wanted to talk with him pertaining to a shortage in the accounts. On Monday (October 5, 1959) Hicks was told to come to the Washington office. He says he spoke with Mr. Morrissette and Mr. David Gruber in the accountant's office.

He says in his own mind he had used the money for company's benefit, even though he realizes now that he was morally wrong. The only time

Plaintiff's Exhibit No. 7 (Cont'd.)

he used the money for personal gain, he says, was to cover his bills over a short period of time. He says in many instances he would use Ace money for short periods of time. He would hold the money until he got his paycheck. He would take the checks and cash them with the intention of paying Ace Van and Storage bills and not his own. He says if he had taken the money for his own financial gain he would have something to show for it.

He says, in his signed statement, that the amount of money involved in the shortage is between two and three thousand dollars. He says he, of course, does not remember the exact amount of money involved. He says he kept a little book record of the shortages at first, but he became "leerie" of that and burned the book.

He says he feels that the exact amount of money shortage after the auditors finish with the records will not be money that he owes since he used the money for the company (to pay bills). However, he says, he realizes that he is the cause and he is willing to make restitution. He says, he can borrow money, but he can't borrow the amount involved here. He would be agreeable to trying to work out some solution to the problem of repaying the shortage. Gaylord J. Hicks, Jr. signed his 3 1/2 pages statement.

Claimed Loss:

Insured's Proof of Loss, dated February 1, 1960 names the defaulter as Gaylord J. Hicks and the period of the defalcation between the date of his employment 1/15/58 and 10/9/59. The amount of the defalcation is shown as $15,252.62, but insured believes it could be substantially more.

Audited Claim:

We have classified our audit summary under the following captions and follow the claim captions as shown in the Proof of Loss:

Plaintiff's Exhibit No. 7 (Cont'd.)

Add'l or Subtr't. Claim	Receipts Not Remitted	Claimed	Accepted	Questioned	Denied
+ $102.00	Proceeds from Com'l Local Movers	2,012.77	1,152.67	479.10	75.00 408.00
	Proceeds from Storage Accounts	338.00	164.00	-	174.00
	Proceeds from sale, labor, gas, etc.	4,729.71	4,312.34	-	417.37
+ 389.78	Proceeds from Interstate Shipments	837.83	338.00	51.78	837.83
	Personal Moves & service unauthorized	165.00	165.00	-	-
	Personal Tel. calls unauthorized	5.00	-	5.00	-
	Proceeds from Interstate Shipments	88.00	88.00	-	-
-2,099.09	Purchases for Personal Benefit	4,054.38	384.08	1,046.22	524.99
	Missing "Ace" Property per Inventory	2,684.18	-	-	2,684.18
+ 10.00	Proceeds from packing & crating	20.50	30.50	-	-
	Misc. collections not remitted	17.25	17.25	-	-
	Unremitted Auctioneer Receipts	300.00	-	-	300.00
1,597.31 (-)		$ 15,252.62	$6,651.84	$1,582.10	5,421.37
	Less-Claim Reduction	1,597.31			
		$ 13,655.31	$6,651.84	$1,582.10	5,421.37

Audit Investigation:

A claim of this type has some identifiable records which can be checked to substantiate the claimant's claim that the employe was dishonest and misappropriated the receipts. For example the customers' storage charges that were paid to G. J. Hicks, manager, but which he failed to deposit locally and show on his daily report to the D.C. office. Also moves made with insured's employes which Manager Hicks failed to record as receipts paid to the Norfolk office.

However, the claimant has included many charges which have not been substantiated as being due to dishonesty of the Norfolk manager. Claimant charges the principal with $2,684.18 in missing Norfolk office property, although no one knows whether this property was on hand when Manager Hicks took over his duties as manager.

For the sake of clarity our audit lists the audited items claimed in the same order as they were submitted in the Proof of Loss.

Plaintiff's Exhibit No. 7 (Cont'd.)

Receipts – Not Remitted. Moving and Storage Charges. Schedules IA – 1B.

Audit – Accepted $1,152.67 Questioned $479.10 Denied $483.00

Insured has claimed $2,012.77 as proceeds from Commercial Local Moves not remitted to the D.C. office. Our audit shows $102. additional should be added, making total $2,114.77.

(a) Bayview Hardware Co., Norfolk, Va. Move charge $408.00. This represents a move using 3 men and van; 10 hrs. at $12. per hr. plus 2% tax, according to insured calculation when submitting the claim.

However, when move was made on 8/1/59 the Norfolk manager, G. J. Hicks charged Bayview Hardware Co. $226.44 (8 men – total of 10 hours at $22. per hr. plus $4.44 tax).

Denied Bayview Hardware Co. said at first they had paid the $226.44, but later upon reviewing their file, admit they had not paid the bill. This bill is still unpaid.

Ace Van & Storage Co. appears to owe Bay View Hardware Co. a bill for $311.10 and we understand these two accounts are in litigation. In the bill for $311.10 Ace Van & Storage Co. is claiming Hicks charged $199.49 worth of merchandise for his own personal benefit.

Since Bayview Hardware Co. admits they owe the $226.44 bill we are not allowing the insured's claim (refigured) as $408. as a dishonesty of G. J. Hicks.

(b) Goodrich Tire Co. rental of Fork Lift Truck is an open billing for $75.00. Ace Van & Storage Co. owes Goodrich on a billing for

Denied $234.36, and the billings are, we understand, under litigation. At any rate it does not appear that the claimant can charge the open

Plaintiff's Exhibit No. 7 (Cont'd.)

receivable billing of $75. which Goodrich has not paid to the fidelity claim of G. J. Hicks. We list the $75. in the denied column.

Under the questioned portion of claim:

(c) Insured claims that 1500 lbs. candy at $2.00 per cwt for hauling from Virginia Beach to Norfolk for Auctioneer Gornto was paid to G. J. Hicks. Information supplied by driver Shepard. We do
Questioned not know whether this $30. was paid to Hicks, or not. It would appear we would have to have evidence that it was paid to Hicks before we could accept it in the claim.

(d) A similar claim for hauling a load of mahogany lumber for Auctioneer Gornto to Norfolk in the amount of $30. Insured's infor-
Questioned mation is from driver Cordes. We have placed this $30. claim in the questionable column, unless more factual data is supplied that it was paid to Hicks and he failed to report this income.

(e) Insured claims a furniture load hauling to auctioneer Gornto for $40. was never reported by Hicks. Information supplied by driver Cordes. No other information. Claimed amount of $40. placed in
Questioned questionable column of claim.

(f) Insured has submitted another moving job claim for $135. covering a Five & Ten Store job. Information supplied to insured by driver Bryant who says it happened in 1959. Unless additional information
Questioned is supplied to reasonably show that G. J. Hicks received this moving income, we are placing this $135. claim in the questionable column.

(g) The storage and delivery accounts paid by customers amounting to $848.67 are supported by confirmation letters sent out by the insured, based on names and addresses found in the Norfolk "log

Plaintiff's Exhibit No. 7 (Cont'd.)

book" of deliveries. Not all "log book" confirmation letters were returned by customers, but on those returned many showed that

Accepted storage and delivery charges had been paid but the receipts were not turned in by the manager, G. J. Hicks, Jr. We therefore accept the customers' letter pertaining to their payments and include these under the accepted portion of claim. Also $210 and $94 amounts.

(h) Insured shows a storage and delivery charge for customer H. D. Whitehead for $244.10. No letter could be found for this customer.

Questioned Until the insured can produce evidence on the claim we have placed it under the "questionable" column of audit.

Proceeds from Storage Accounts Schedule #2 Claimed $338.00 Audited $164.00

This schedule shows five additional customers who had paid for moving charges to G. J. Hicks, Jr. according to the confirmation letters returned to the insured. These five moving charges paid for by the customers which were not remitted in G. J. Hicks' receipts, total to $164.00. Insured in their charges had duplicated Sal Novak, R. L. Ledbetter etc. charges shown in Schedule # 1B.

Proceeds from Sale of Labor, gasoline etc. to Other Van Lines while in D.C. Sched. 3A-3J Claim $4,729.71 Accepted $4,312.34 Questioned -0- Denied $417.37

Out of city movers bringing in or taking out a moving load pick up their helpers at the local site. These schedules show the labor, gasoline, telephone charges, etc. paid by the drivers of these vans to G. J. Hicks, Jr., manager of the Norfolk office, for these services. Hicks would type out a bill on Ace Van & Storage Co., Inc. invoice and stamp the bill paid

Plaintiff's Exhibit No. 7 (Cont'd.)

with date and his initial or signature. The insured obtained all the bills listed on these schedules from the trucking companies involved.

Claimed		Total Billings	Remitted to D.C.	Gasoline
$ 561.45	Shawmut Van Lines, Inc.	560.45		
2,495.73	Richardson Transf. & Storage Co.	2,073.49		1,645
1,652.53	American Van & Storage Co., Inc.	1,744.59	$ 86.19	563 gals.
10.00	A. Arnold & Son Transp. Co.	10.00		
10.00	Whitney Transportation Co.	10.00		
$4,729.71		$4,398.53	$ 86.19	
	(A) Subtract Remittance Rec'd	86.19		
	Audited Amount accepted	$4,312.34	-	2,208 gals.

Proceeds from Interstate Shipments Schedule # 4

The insured's claim is for $837.83. This is made up of two claimed remittances, one for Blankenship of $428.40 and the other for Oraxio, Augusto $359.43 (note) and $50. cash.

We have denied the claim for Blankenship of $428.40. G. J. Hicks, Jr. stated that he would make out a fictitious check at the end of the month, on occasions, to balance out the old storage accounts, in other words, to indicate that they had been paid, although Hicks had previously withheld the payments for his own use. This fictitious check would be drawn on a bank a great distance away, one was in California. The check would be deposited on the end of the months, the storage accounts credited for the amount of the check and they would not show on the D.C. open storage accounts receivable. The bank in California would return the fictitious check, generally as drawer unknown, and their local bank, National Bank of Commerce, would then debit the account with the uncollectible check. The following months Hicks would send another fictitious check to another

Plaintiff's Exhibit No. 7 (Cont'd.)

bank for collection. Since this Blankenship check was only a cover up for outstanding storage accounts receivable, which is claimed elsewhere by the insured, we have rejected this $428.40 in the claim.

Insured has also claimed a moving charge for customer Augusto Oraxio from Norfolk to Dothan, Alabama where supposedly a note for $359.43 and cash deposit of $50. was made to the Norfolk office. Since a note is involved in this claim we have been shown no evidence that Hicks misappropriated this sum. Until the insured can show sum was misappropriated by Hicks we have classified it under the denied column of claim.

However, there is another customer's letter, Mrs. S. J. Pappufotes, Asheville, N.C. to G. J. Hicks $389.78 for their move from Norfolk, Virginia to Asheville, N.C. There is no evidence that this amount was remitted. The customer indicated they paid $1.78 by check (tax); they paid $338. in cash and a bank draft of $50. We have accepted the $338. cash payment in the accepted portion of claim. The $51.78 is placed in the questionable section of claim until it is shown that Hicks misappropriated this sum. In the claim the insured had not included Pappufotes' claim since their letter was not received at the time the claim was prepared.

Personal Moves and Services Not Authorized by the Insured's D.C. Office. Schedule #5

Insured claims that Manager Hicks moved five times while he was employed by them in Norfolk. They claim that the labor and van moves for Hicks were not authorized to be done free and are claiming the $165. as personal expenses incurred by Hicks and paid for by them. We have accepted this charge in the claim.

Plaintiff's Exhibit No. 7 (Cont'd.)

Personal telephone charge made by Hicks to Tidler Schedule #6

Insured claims that G. J. Hicks Jr., manager of the Norfolk storage terminal, made two personal telephone calls to Tidler, bookkeeper in the D.C. office and this was on their bill in September 1959 for $5.00. It is surprising that the insured should pick up such a small charge in the claim, particularly since it cannot be sure whether the telephone call was on business, or not. Apparently the call was placed on a pay station and reversed the charges to Ace Van & Storage Company's bill. At any rate, we don't know whether the charge was business or not, so have placed the claim of $5.00 under the questionable column.

Proceeds from Intra State Moves Not Remitted to D.C. Schedule #7

Insured has letters from Mary Jane Rawlins regarding two moves she made, one from Norfolk to Richmond, Virginia and one from Richmond to Norfolk, Virginia, each costing $44, or a total for two moves of $88.00. Insured's records do not show that they ever received payment for these two moves, but customer has receipts for same signed by Hicks. We have therefore classified the $88. under the acceptable column of audit.

Purchases for Personal Benefit — Charged to Ace Accounts
Schedules 8A - 8E

Insured's claim is for $4,054.38 supposedly representing merchandise, services etc. procured by G. J. Hicks,, Jr. for his personal use, but charged to the accounts of Ace Van & Storage Co., Inc. for payments.

On Schedule 8A we have rejected the $517.51 from the audited claim. Items 1 to 8 are duplicated as charges on Schedule 8B by the insured.

The magazine subscriptions totalling $16. are rejected since they could have been used for reading material in their office.

Plaintiff's Exhibit No. 7 (Cont'd.)

Insured is claiming the cost of a Coca Cola machine which Hicks signed a Leasee contract for and was used in the office. This claim is for $150. and is rejected since Hicks as manager apparently had some authority to commit the company to fringe benefit for the employees. At any rate it is likely that Mr. Morrissette knew of this machine since he visited the Norfolk office fairly frequently, and if he did not want it when it was installed he should have told them to get rid of it. We do not see how the rental of the Coca Cola machine can be claimed as a dishonesty against G. J. Hicks, Jr.

The items billed by Goodrich namely a radio $25., 36 gals anti-freeze $66.60; 12 gals. anti-freeze $22.20 and battery $33.17 totalling $146.97 appear to be equipment that could be used by a moving van company. Unless insured can show that this equipment was used solely by Hicks for his personal use, we feel it should be rejected in the claim.

Schedule 8B shows our classification of items claimed and reasons as follows:

		Claim	Accepted	Questioned	Rejected	Reason
	B. F. Goodrich	$234.36		$ 234.36		Same on Sched.#1
	Bayview Hdse.	199.49			$199.49	" " "
- 2.51	Byron, Old, Eaton	61.61				Hicks Pd. $110.
	Colonial Bedding	90.00				Hicks Pd. $90.
	Epes-Fitzgerald	128.15		128.15		Claim Hicks Sold 32 Reams of paper
	Janet Typewriter	12.00		12.00		Claim Hicks' use
	Kline's Sales Co.	123.42	123.42			Claim Hicks' car
+ .75	Office Supply Co.	59.25				Hicks Pd. $60
+20.00	Old Dominion Paper	384.42		54.42		Hicks Pd $350.

Plaintiff's Exhibit No. 7 (Cont'd.)

Osborne, Kemper	154.50		154.50		Claim Hicks use Novelties
Norfolk Glass etc.	12.85		12.85		Claim Hicks use
Powell McClellan	62.17	62.17			Lumber sent to Hicks' house
Radio Sta. "WCH"	1,225.50			325.50	Hicks pd. $900
Royal McBee,Inc.	30.60		30.60		Carbon & ribbons
Thos. D. Murphy Co.	374.97		374.97		Claim Hicks' use Novelties
Sears, Roebuck	22.70		22.70		Claim Hicks' use letter separator
Southern Material	24.15	24.15			Gravel for Hicks' driveway
Wilkins Chevrolet	112.52	-	-	-	Hicks pd. $112.52
W.W. Grainger Co.	21.67		21.67		Coffee Urn & bag
Standard Off. Sup.	74.65	74.65			Numbering Mach.
-16.35 Cavalier Lumber + 1.89	116.04	99.69			Claim lumber for Hicks' home
	$ 3,525.02	384.08	$ 1,046.22	524.99	$1,571.62 Hicks Paid
	+ 1.89				
	$ 3,526.91				
R. L. Harris	12.85	withdrew from claim			
Above total	3,525.02				
Claimed	$ 3,537.87				

Missing Ace Van & Storage Co., Inc. Property as per Inventory — Schedule 9A-9C

Insured is claiming missing property at the Norfolk warehouse as being due to G. J. Hicks, Jr.'s dishonesty.

32 Reams Newsprint (Epes-Fitzgerald)	$113.15 (Also in Claim Sched. #8C)
2000 lbs. Newsprint (Old Dominion)	170.00 (Also in Claim Sched. #8D) $283.15

Plaintiff's Exhibit No. 7 (Cont'd.)

1 Two Wheel Hand Truck (large tires)	85.00	
1 Vacuum Cleaner	40.00	
1 Swivel Typist Chair	10.00	
1 Straight Chair	5.00	
1 Wheel & Tube for Station Wagon	15.00	
Pallet Pads 1120 charges-542 on hand Oct. 59. Missing 578 ea. $1.00	578.00	
		733.00
Claim gasoline short in tank:		
Period 4/24/59 — 10/7/59 short 1833 gals. ea. .26¢	476.58	
Period 3/15/58 — 4/24/59 short est. on above	1,191.45	
		1,668.03
Total claimed		$2,684.18

The insured's claim for $283.15 is also claimed on Schedules 8C and 8D and is eliminated from this claim.

The Norfolk property claimed missing has not been proven as being due to the dishonesty of Gaylord J. Hicks, Jr. It is not known whether this inventory was ever verified before in the past several years, even before Hicks came with the company.

The 1833 gallons of gasoline shortage claimed is partly nullified for the 4/24/59 to 10/7/59 period by the sale of gasoline to outside van truckers claimed in the shortage on Schedules 3A - 3J. Sale of gasoline during this period was 967 gallons.

American Oil Co. Period 4/24/59 - 10/7/59

Schedule #9B

Received	6,115 gals.
Used	4,275.7 gals.

Plaintiff's Exhibit No. 7 (Cont'd.)

Difference	1,839.3
Sold to other Vans	967.0
Unaccounted for	872.3 gals.

However, we do not know how much gasoline was in the tank at 4/24/59 and 10/7/59, which is necessary for the reconciliation. We show the insured's claim for missing "Ace" property, including gasoline under the rejected column of claim, since it has not been reasonably proven that Hicks misappropriated it.

Proceeds from Packing & Crating Not Remitted to the D.C. office by Norfolk - Sch. #10

Insured claims two crating jobs that they are now aware of were never reported by the Norfolk office

6/15/59	Crating of Electronic equipment	$25. shipped from Norfolk to Cal. by plane
7/15/59	Board Electric Co.	5.50 crated air conditioner for Board
		$30.50

Since insured's record do not show any receipts for these two crating jobs, we have included them under the accepted column of audit.

Miscellaneous Collections not Remitted to D.C. office by Norfolk — Schedule #11

Insured says Driver, Willie Simmons, paid Hicks $17.25 for uniform deposits when he left. Hicks never turned in the money to the D.C. office. Insured had to pay Old Dominion Paper Co. for lost uniform services. Drivers' uniforms are hired. If this statement is true, it appears that this $17.25 claim should be accepted.

Plaintiff's Exhibit No. 7 (Cont'd.)

Unremitted Auctioneer Receipts (Cornto) Schedule #12

Insured states that at the time of Hicks' trial in Norfolk, Mr. Leon H. Cornto, auctioneer, told him he had paid bills signed by G. J. Hicks for approximately $300. representing crating and packing services rendered by Ace Van & Storage Co.

Ace Van & Storage Co. books show one receipt from Hicks for payments made by Gornto Auction Co. Insured is claiming the $300. as receipts paid by Gornto to Hicks. We have seen no receipts issued to Gornto by Hicks except one bill dated March 2, 1959 as follows:

Gross Sale (Auction)	$434.95	
Less 10% commission	43.50	
Hicks remitted this to D.C.	$391.45	on 3/2/59

If this is what insured is talking about, then we do not see that this is a dishonest act on Hicks' part. We have placed this claim for $300. in the rejected column.

PLAINTIFF'S EXHIBIT NO. 12

[Filed November 19, 1963]

Liberty Mutual Insurance Co.
1346 Connecticut Ave., N.W.
Washington, D.C.

November 10, 1959

Mr. Milton M. Burke
Attorney at Law
Suite 205 - Denrick Building
1010 Vermont Avenue, N.W.
Washington 5, D. C.

Re: Ace Van & Storage Company, Inc. -- Gaylord J. Hicks
F35-409 FD60-7244

Dear Mr. Burke:

This will acknowledge your letter of October 13, 1959, your letter of November 2, 1959 and our conversation on November 6, 1959. As I explained to you I was hoping to have more information from our Norfolk Office before giving you a direct answer to your request in paragraph three of your letter of October 13, 1959.

Regarding your request that we give Mr. Morrissett authorization to cover reasonable expenses incurred for the investigation of this loss, I pointed out to you and to Mr. Morrissett that it would be necessary for Ace Van & Storage Company to pay for the investigation.

Since our conversation on November 6, 1959 I have been in touch with our Norfolk Office and they will keep us advised as to further developments. We are submitting a proof of loss form to Mr. Morrissett which he can complete and return with all supporting information on the loss.

Thank you for your cooperation.

Very truly yours,

/s/ Fred A. Grier
Claims Representative

FAG: th

[Filed June 24, 1963]

MEMORANDUM OPINION

The plaintiff corporation purchased from the defendant insurance company a so-called Crime Policy insurance policy which was effective as of September 21, 1956 and which remained in effect until at least September, 1959. The policy insured the plaintiff against any "loss, including loss of property, due to any dishonest or fraudulent act committed anywhere by any of the employees, whether acting alone or in collusion with others, whether or not the insured is able to designate the persons causing the loss."

Section 7 of the policy provided that:

> "Upon the discovery by the insurance of any loss or damage, the insured shall:
>
> * * *
>
> "file proof of loss with the company within ninety days after the discovery of loss or damage, unless such time is extended in writing by the company, in the form and manner required by the company."

The policy contained a further provision in Section 13 which provided that:

> "Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the President or a Vice President and the Secretary or an Assistant Secretary of the company and, if such signatures are facsimile signatures, counter-signed by a duly authorized representative of the company."

In September of 1959, the plaintiff corporation through its president discovered certain facts which cast some suspicion upon the integrity of Gaylord Hicks, the manager of the Norfolk branch of the plaintiff corporation. Plaintiff's president consulted the certified public accountant employed by the corporation for the periodic audit of the corporation's books, and on or a day or so before October 9, 1959 sufficient information was developed to convince the plaintiff that its employee, Gaylord Hicks, was involved in a variety of transactions suggesting embezzlement

or other forms of defalcation, which transactions had occurred, apparently, during the twenty-month period of Gaylord Hicks' employment. Confrontation of its employee by the plaintiff resulted in at least oral admission of some irregularities.

On or about October 9, 1959 in the office of plaintiff's certified public accountant, the president of the plaintiff corporation accompanied by his attorney was in conference with a Mr. Grier, a representative of the defendant insurance company. The conference lasted several hours and consisted of a general discussion of the discovery that Gaylord Hicks had apparently committed dishonest acts which may have resulted in substantial loss to the plaintiff. It was the sense of the conference that the matter would require substantial investigation. At or about this time a memorandum was prepared by the plaintiff's certified public accountant, which appears in the record as Plaintiff's Exhibit #2. The memorandum, signed by the president of the plaintiff corporation Arthur E. Morrissette and Frederic A. Grier of the defendant company, set forth in general terms the substance of the conference, indicated that the plaintiff would terminate the employment of Gaylord Hicks, and provided for a meeting of plaintiff's and defendant's representatives at Norfolk "for the purpose of preliminary investigation." The memorandum then set forth that such information as was available to the plaintiff was reviewed with Mr. Grier and that copies of some documents would be delivered to him, or another representative of the defendant, in Norfolk. The concluding paragraph of this Exhibit sets forth that: "The representative of Ace Van & Storage Company, Inc. and of Liberty Mutual Insurance Company will continue the investigation to as prompt a disposition of this matter as is reasonably possible."

Thereafter, the plaintiff corporation discharged Hicks, and cooperated with state authorities in the prosecution of Hicks, which prosecution resulted in his acquittal on the charges preferred against him.

On November 10, Mr. Grier as claims representative of the defendant company furnished to Milton M. Burke, the plaintiff's attorney, a proof of loss form for Mr. Morrissette "which he can complete and

return with all supporting information on the loss." This letter, which contained other material relating to other aspects of this case, is identified in the record as Plaintiff's Exhibit #12.

The proof of loss form, Plaintiff's Exhibit #6, was executed by the plaintiff's attorney on February 1, 1960 and was furnished to the defendant company on or about that date. It will be obvious at this point that the proof of loss form was filed some 21 days beyond the 90 day period measured from October 9, 1959--that is, the date upon which the defalcations were first discussed with the defendant's representative.

The pleadings and testimony in this case raise a number of legal questions. At the threshold, however, the Court encounters the defendant's contention that the proof of loss form was not timely filed and that this failure to conform with the terms of the policy bars the plaintiff's recovery. The plaintiff contends that the company was orally advised of such information as was available to the plaintiff as the information was developed by the investigation and further asserts that plaintiff's exhibit #2, that is, the memorandum of the meeting of October 9, 1959, constituted an agreement on the part of the defendant company to waive the formal requirements of notification.

Counsel, in argument and briefing of this point, have cited a number of cases dealing with the interpretation of ambiguities in insurance policies and the plaintiff has further argued that in dubious situations insurance policies must be interpreted against the insurance company which prepared them.

From a factual situation, the Court observes that this situation was not one in which a layman unlearned in the law acted in ignorance of the provisions or meanings of an insurance policy. From the inception of the situation and at the time of the initial discovery of the employee's defalcations, the plaintiff corporation through its president was in constant communication not alone with his certified public accountant but also with the plaintiff's attorney. The plaintiff's attorney was present at the conference of October 9, 1959. The insurance policy which is the basis of this action was available to the plaintiff's accountant and to his

attorney. It follows that the plaintiff corporation had the benefit of skilled counsel throughout this entire situation.

The provisions of Section 7 of the insurance policy are not in the Court's opinion in the least ambiguous. They provide specifically and positively for the filing of a proof of loss with the company within 90 days, unless such time is extended in writing by the company. This provision of the contract must have been known to the plaintiff corporation and to its attorney. If the plaintiff was unable to meet the requirements of this clause, it would appear to have been a relatively simple matter to request an extension of the time in which the proof might be filed. The Court does not believe that Plaintiff's Exhibit #2 constituted any binding agreement on the part of the defendant company to waive the provisions of Section 7 of the policy. Moreover, the plaintiff was represented by counsel with knowledge of the provisions of Section 13, quoted above, which provided the means whereby waivers or changes in any part of the policy might be established.

The Court does not believe that any conduct of the defendant company within the record before the Court was designed to lure the plaintiff into any false sense of security under the terms of the policy. Plaintiff's Exhibit #12 dated approximately 60 days before the expiration of the 90 days proof of loss period does not directly or by any inference whatever suggest that the defendant corporation was waiving any of the terms of the insurance policy.

The Court must consider the insurance policy as a binding contract which created rights and obligations on the part of each of the contracting parties. The Court concludes that the plaintiff failed to fulfill an obligation on its part to file a proof of loss within the 90 days period or to take the described steps to extend this period of time. The Court concludes, consequently, that this failure on the part of the plaintiff under the circumstances of this case in which, as indicated, plaintiff was constantly in consultation with its attorney constitutes such a violation of the terms of the insurance policy as to preclude the plaintiff's recovery upon the policy.

Other contentions of the parties concerning the nature and extent of the insurance coverage in this case become moot in view of the Court's ruling upon what it considers the basic point of law in this case, and consequently the Court refrains from discussion of these points.

Counsel will prepare and submit to the Court appropriate findings of fact and conclusions of law and the necessary order to effectuate the ruling of the Court.

/s/ Edward A. Tamm
Judge

Dated: June 24, 1963.

[Filed Sept. 9, 1963]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be tried upon the facts without a jury and in consideration of the evidence adduced at the trial, the Court specially finds the following facts:

1. Plaintiff Ace Van & Storage Co., Inc., purchased a so-called Crime Policy insurance contract issued by defendant, which was effective as of September 21, 1956 and which remained in effect until at least September 1959. This policy of insurance insured plaintiff against any ". . . loss, including loss of property, due to any dishonest or fraudulent act committed anywhere by any of the employees, whether acting alone or in collusion with others, whether or not the insured is able to designate the persons causing the loss."

2. The policy contained the following conditions precedent to liability thereunder:

Condition 7

> Upon the discovery by the insured of any loss or damage, the insured shall:
>
> . . . .

file proof of loss with the company within ninety days after the discovery of loss or damage, unless such time is extended in writing by the company, in the form and manner required by the company.

The policy contained a further provision that:

Condition 13

CHANGES Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy, nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the President or a Vice President and the Secretary or an Assistant Secretary of the company and, if such signatures are facsimile signatures, counter-signed by a duly authorized representative of the company.

3. In September 1959 plaintiff corporation, through its President, discovered certain facts which cast suspicion upon the integrity of Gaylord Hicks, manager of the Norfolk branch, and promptly consulted the certified public accountant employed by the corporation for a periodic audit of the corporation books and records.

4. Prior to October 9, 1959 sufficient information was developed to convince plaintiff that its employee was involved in a variety of transactions suggesting embezzlement or other forms of defalcation and confrontation of Gaylord Hicks by plaintiff's President resulted in at least oral admission of some irregularities.

5. On October 9, 1959 the President of plaintiff corporation, plaintiff's attorney and plaintiff's certified public accountant were in conference with a Mr. Grier, a representative of defendant insurance company, and at the conclusion of that conference a memorandum was prepared by plaintiff's certified public accountant, which appears in the record as plaintiff's exhibit No. 2. The concluding paragraph of this memorandum set forth that: "The representative of Ace Van & Storage Co., Inc., and of Liberty Mutual Insurance Company will continue the investigation to as prompt a dispostion of this matter as is reasonably possible."

6. Thereafter plaintiff corporation discharged Hicks and cooperated with state authorities in the prosecution of Hicks, which prosecution resulted in his acquittal on the charges preferred against him.

7. The proof of loss form supplied by defendant's representative, which has been designated as plaintiff's exhibit No. 6, was executed by plaintiff's President on February 1, 1960. It contained a sworn statement that: "The amounts set forth . . . have been fraudulently misappropriated by the Employee to His own use . . . that said misappropriation was first discovered on October 9, 1959 by Myself . . . . "

8. Throughout the entire situation the plaintiff's President had the benefit of constant communication with plaintiff's certified public accountant and its attorney.

9. The provisions of section 7 of the insurance policy are not in the least ambiguous. They specifically and positively provide for the filing of proof of loss with the company within ninety days unless such time is extended in writing by the company.

10. The proof of loss was not filed within the time required and there was no written agreement to extend the time.

11. There was no agreement of any kind to extend the time within which proof of loss was required to be filed and defendant never waived the requirements of the policy or engaged in any conduct which was designed to lure the plaintiff into any false sense of security under the terms of the policy.

12. Plaintiff's exhibit No. 2 does not constitute any agreement on the part of the defendant insurance company to waive the provisions of section 7 of the policy.

13. Other contentions made by the parties concerning the nature and extent of the insurance coverage have become moot in view of the Court's ruling upon what it considers the basic point of law in this case and are, therefore, not decided.

CONCLUSIONS OF LAW

Upon the foregoing facts, the Court states its conclusions of law:

1. Plaintiff discovered loss or damage on or prior to October 9, 1959.

2. The condition requiring plaintiff to file proof of loss with the defendant company within ninety days after the discovery of any loss or damage is a condition precedent to any action against or liability on the part of defendant.

3. There was no waiver of the terms of the policy or any estoppel against reliance thereon.

4. Plaintiff has failed to sustain its burden of proof to establish its claimed right to recover against defendant on the policy in issue.

/s/ Edward A. Tamm
United States District Judge

Certificate of Service
A copy of the foregoing Findings of Fact and Conclusions of Law was mailed, postage prepaid, this 28th day of June 1963 to Milton M. Burke, Esquire, Attorney for Plaintiff, 1010 Vermont Avenue, N. W., Washington, D. C.

HOGAN & HARTSON

By /s/ John P. Arness
Attorneys for Defendant

* * *

[Filed Sept. 9, 1963]

JUDGMENT

This cause came on to be tried upon the facts without a jury and in consideration of the evidence and pursuant to the memorandum opinion and the findings of fact and conclusions of law filed hereinbefore, the Court this (7th Sept. 63) ~~7th day of July~~ 1963 hereby directs the entry of the following judgment:

1. That defendant, Liberty Mutual Insurance Company, shall have judgment against the plaintiff, Ace Van & Storage Co., Inc., on plaintiff's complaint to recover loss under policy of insurance.

/s/ Edward A. Tamm
United States District Judge

[Filed October 4, 1963]

NOTICE OF APPEAL

Notice is hereby given this 4th day of October, 1963, that Ace Van & Storage Co., Inc., hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 9th day of September, 1963 in favor of Liberty Mutual Insurance Company against said Ace Van & Storage Co., Inc.

/s/ Milton M. Burke
Attorney for Plaintiff
1010 Vermont Ave., N. W.
Washington, D. C.

[Filed November 22, 1963]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL PURSUANT TO RULE 75 (d).

In compliance with the requirements contained in Rule 75 (d), the plaintiff represents to the Court that the points on which he intends to rely on appeal are limited to the following:

1. The Court was in error in entering a finding for the defendant on the basis that the plaintiff did not file a proof of loss with the company within ninety (90) days.

2. That the aforesaid finding by the Court and the subsequent entry of the judgment in favor of the defendant on the ground that the plaintiff had failed to file a proof of loss within the ninety day period provided by the insurance policy was contrary to the evidence and the weight of evidence, and was contrary to the law and the weight of the law.

3. This appeal is in fact limited to the single question whether the trial judge, on the basis of the evidence and the law, properly entered a finding and judgment in favor of the defendant on the theory that the plaintiff had failed to file a proof of claim within ninety days of the alleged date of discovery of loss.

/s/ Milton M. Burke
Attorney for Plaintiff
1010 Vermont Avenue, N. W.
Washington 5, D. C.

PROOF OF SERVICE

Copy of the foregoing was mailed to John P. Arness, Esquire, Attorney for Defendant, 800 Colorado Building, Washington, D. C.

/s/ Milton M. Burke
Attorney for Plaintiffs

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,251

ACE VAN & STORAGE CO., INC.,
Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Appellee.

Appeal From The United States District Court For The District of Columbia

---

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PIERRE J. LAFORCE
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Washington, D. C.
Attorneys for Appellee

HOGAN & HARTSON
Of Counsel

WILSON - EPES PRINTING CO. - RE 7-0002 - WASHINGTON 1, D. C.

INDEX

TABLE OF CASES

* Cases marked with asterisks chiefly relied upon.

QUESTIONS PRESENTED

1. May appellant ignore the findings of fact made by the trial court and seek a trial de novo, in the absence of a showing that such findings are clearly erroneous?

2. Did the trial court properly find that appellant had failed to file proof of loss within the policy period, the nonperformance of which precluded it from recovery?

3. Does the trial court finding that appellee never agreed to waive or extend the period of time within which to file a proof of loss preclude appellant from recovering under the policy?

4. Does the trial court finding that appellee never waived the requirements of the insurance contract or engaged in any conduct which would estop it from setting up appellant's nonperformance of the contract preclude appellant's recovery under the policy?

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,254

ACE VAN & STORAGE CO., INC.,
Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Appellee.

Appeal From The United States District Court
For The District of Columbia

BRIEF FOR APPELLEE

Counterstatement of Case

This case arose out of a claim under a crime policy issued to appellant by appellee, (J.A. 107). The policy was a limited coverage of indemnity issued in consideration of a relatively small premium, and contained the following relevant provisions:

Condition 7

INSURED'S DUTIES WHEN LOSS OCCURS. Upon the discovery by the insured of any loss or damage the insured shall. . . .

(b) file proof of loss with the company within ninety days after the discovery of loss or damage, unless such time is extended in writing by the company, in the form and manner required by the company.

* * * *

Condition 9

ACTION AGAINST COMPANY. No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy. . . .

* * * *

Condition 13

CHANGES. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by indorsement issued to form a part of this policy, signed by the President or a Vice President and the Secretary or an Assistant Secretary of the company and, if such signatures are facsimile signatures, countersigned by a duly authorized representative of the company. (Plaintiff's Exhibit No. 1, J.A. 74, 75)

In September 1959 appellant, through its president, discovered facts which raised severe doubts as to the integrity of one Gaylord Hicks, the manager of its Norfolk branch, (J.A. 16, 107). Appellant's president immediately began an investigation into the operations of the Norfolk branch and consulted with others including appellant's accountant, (J.A. 16, 107). Appellant's accountant was immediately directed to perform certain accounting and statistical studies (J.A. 49) as part of this investigation. A day or so before October 9, 1959, sufficient

information was developed to convince appellant that the aforementioned Hicks had been involved in transactions suggesting embezzlement or other forms of defalcation during his term of employment with appellant, (J.A. 16-17, 107-108). On October 9, 1959, a conference was held to discuss the alleged embezzlement. Present thereat were appellant's president, lawyer and certified public accountant, along with one of appellee's agents, (J.A. 18, 63, 108). The meeting concerned itself with a general discussion of the loss occasioned by the dishonest acts of Hicks and of the procedure to be followed, (J.A. 108). Plaintiff's Exhibit No. 2 purports to be a memorandum of the conference, (J.A. 77). It was dictated by appellant's accountant and was signed by appellant's president and appellee's agent, (J.A. 20, 63, 77).

Shortly after this conference, by letter dated November 10, 1959 appellee's agent submitted a proof of loss form to appellant to be completed and returned in accordance with the policy. A Norfolk accounting firm had been retained by appellant in connection with investigation of the loss and submitted its report on December 30, 1959, (J.A. 30, 48). After the preliminary studies conducted in September and early October, appellant's regular accountant performed no further studies until long after this suit was filed, (J.A. 49). A proof of loss was executed by appellant's president on February 1, 1960. This was 21 days beyond a 90 day period measured from October 9, 1959, the date upon which the defalcations were first *discussed* with appellee's representative (Plaintiff's Exhibit No. 6, J.A. 88-89, 109) and long after a 90 day period measured from discovery. No request was ever made by appellant for an extension of the filing time, as was expressly provided in the policy, (J.A. 110). No amount was ever paid by appellee to appellant on account of the alleged loss, (Prehearing Order, J.A. 7).

Suit was filed by appellant on August 3, 1960. One of the defenses raised by appellee was that appellant had

failed to comply with the conditions of the insurance contract in that it had not filed proof of loss within 90 days of discovery of the loss, (Prehearing Order, J.A. 7, 8). At trial appellant argued that the considerable time needed to investigate the loss excused this nonperformance of the contract. Yet, the evidence disclosed (1) that appellant's president was in receipt of an auditing report concerning the Norfolk loss as early as December 30, 1959, (J.A. 48); (2) no investigative work concerning this loss was performed by appellant's regular accountant until long after this suit was filed, (J.A. 49); (3) appellant's accountant testified, on direct examination, that the investigation would take six to ten weeks, (J.A. 68); and (4) appellant never notified appellee that it needed an extension of the filing time and never requested such an extension, (J.A. 110).

Appellant also contended that a memorandum of the October 9, 1959 conference between appellant's president, accountant and attorney, and a representative of appellee, consituted a waiver of the policy requirement of proof of loss or an extension of the filing time. The language relied upon to support this contention was as follows: "The representative of Ace Van & Storage Company, Inc. and of Liberty Mutual Insurance Company will continue the investigation to as prompt a disposition of this matter as is reasonably possible.", (Plaintiff's Exhibit No. 2, J.A. 77, Finding of Fact No. 5, J.A. 112). This contention was specifically rejected by the trial court on the ground that the memorandum language did not support that contention, (Finding of Fact No. 12, J.A. 113).

The trial court, sitting without a jury, gave judgment for defendant, (J.A. 115). The court filed a Memorandum Opinion (J.A. 107-111), along with Findings of Fact and Conclusions of Law (J.A. 111-114).

Among the Findings of Fact made by the lower court were the following: (1) Appellant had the benefit of constant communication with its accountant and attorney throughout the entire situation; (2) The provisions of Section 7 of the policy were not in the least ambiguous; they specifically and positively provided for the filing of proof of loss within 90 days unless such time is extended in writing by the company; (3) Proof of loss was not filed within the required time and there was no written agreement to extend that time; (4) There was no agreement of any kind to extend the time; appellee never waived the policy requirements or engaged in any conduct designed to lull appellant into inactivity; (5) The memorandum of the conference of October 9 did not constitute a waiver agreement, (J.A. 113). In its Conclusions of Law the court stated: (1) Appellant discovered loss on or prior to October 9, 1959; (2) The condition requiring the proof of loss to be filed within 90 days was a valid condition precedent to any action against or liability on the part of defendant; (3) There was no waiver of the policy terms or any estoppel against reliance thereon; and (4) Appellant failed to sustain its burden of proof. (J.A. 114).

Summary of Argument

Appellant appeals from a judgment denying it a recovery under a policy of insurance for failure to file written proof of loss within 90 days of discovery of loss as required by the policy.

The record amply supports the findings of the trial court, sitting without a jury, that appellant failed to perform a condition precedent and that it failed to prove any conduct which constituted waiver or estoppel on the part of appellee. These findings are not clearly erroneous within the meaning of Rule 52 of the Federal Rules of Civil Procedure.

The validity and enforceability of conditions requiring the filing of a written proof of loss with the insurer within a stipulated period of time are indisputable. Nonperformance of such a condition by the insured precludes recovery under the contract.

Appellant's contention that appellee waived the policy requirements or extended the period within which to file written proof of loss at an October 9, 1959 conference is without evidentiary support.

No waiver or estoppel can occur, in a case involving an untimely filing of a proof of loss, unless the action complained of misled the insured. The law is that waiver must be clearly shown and the insured has the burden of so doing with clear and unequivocal evidence. Appellant did not meet this burden. The record further fails to show any deviation from a consistent course of conduct on the part of appellee, evidencing insistence that appellee meet its contractual obligations.

Argument

I. *The Findings of Fact and Conclusions of Law Made by the Trial Court Have Ample Support in the Record and are not Clearly Erroneous*

The basic facts of this case are set out in detail in Judge Tamm's Memordanum Opinion (J.A. 107-111) and his Findings of Fact and Conclusions of Law (J.A. 111-114). Appellant's brief entirely ignores the findings made below and is essentially a reargument of the allegations of the complaint and the various papers filed by appellant in this case, which, after full and complete hearing, the trial court refused to find to be the facts.

Appellant is apparently seeking a trial de novo on the record of all the allegations and issues which were disposed of by the trial court contrary to its position. Such is precluded by the clear language of Rule 52, of the Federal Rules of Civil Procedure, which provides, in pertinent part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Appellant does not expressly take the position that the trial court's findings are "clearly erroneous" within the meaning of Rule 52. Nevertheless, it states the case in a manner which conflicts in all material respects with the facts as found. Appellant utterly ignores the fact that this case was heard by the trial court and that complete and exhaustive findings were made by that court. To sustain appellant's arguments here would require this Court, in the absence of any showing that the findings are "clearly erroneous", to disregard the unequivocal mandate of Rule 52. When confronted by a similar request of the appellant in *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485, 495-96 (1950), the Supreme Court stated:

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to action which the District Court apparently deemed innocent .... We are not given those choices, because our mandate is not to set aside findings of fact "unless clearly erroneous."

It is obvious that this is not a case of overreaching by an insurance company or one in which the insured acted in ignorance of the provisions or meanings of an insurance policy. At all times, from the very first suspicion entertained by the appellant's president, he was in constant communication and consultation with appellant's attorney and accountant, (J.A. 16, 17, 18, 36, 38). The crime policy which is the basis of this action was always available to appellant's attorney. Appellant must be deemed, under these circumstances, where its counsel was fully apprised of the policy provisions, to have full notice

thereof. Condition 7 of the insurance policy (J.A. 74) clearly and positively sets forth the requirement that written proof of loss be filed within 90 days from discovery of the loss. There could be no misunderstanding as to the effect of said condition.

Appellant complains that it could not file its proof of loss within the required time because of the considerable time needed for investigation. The record shows, however, that appellant's accountant testified that investigation would only take from six to ten weeks, (J.A. 68). The record further shows that, as early as December 30, 1959, appellant was in receipt of an audit report prepared by Norfolk accountants retained by appellant to investigate the loss (J.A. 48) and that appellant's regular accountant never performed any investigation of the loss during the crucial 90 day period, (J.A. 49). Finally, the record is devoid of any notice given to appellee that further time was needed and no request for an extension of time within which to file proof of loss was ever made. Clearly then, it must be found that appellant's nonperformance of the contract is neither justifiable nor excusable.

Appellant also claimed that appellee, at the October 9, 1959 conference, either waived the policy provision or extended the 90 day filing time. This contention is more fully met and disposed of in Part III of this Argument. Suffice it to say at this point that the most cursory perusal of the memorandum of this conference and the attendant circumstances can only lead to a rejection of this contention.

Appellant makes much of a certain conference that was held at the office of appellant's counsel in April 1960. Present thereat were appellee's representative and appellant's president, attorney and accountant, (J.A. 38). Appellant's president, in his testimony, gratuitously stated that the meeting was for settlement purposes, (J.A. 38). This

is clearly refuted by the testimony of appellant's accountant who stated that the meeting was called to discuss an investigative report prepared by appellee (J.A. 66) and is also contradicted by the admission of appellant's counsel, (J.A. 67). The report in question was a routine investigation audit prepared by appellee and no more.

Appellant makes constant reference to a course of settlement negotiations which, appellant contends, constitutes a waiver or estoppel by appellee. Yet, nowhere in the record (except for reference to the April meeting) can there be found testimony or other evidence of such negotiations. Appellant nowhere cites to a part of the record which would indicate that appellee ever admitted liability. Nor can appellant show a settlement offer during this period. The testimony of appellant's accountant indicates that there were meetings after the April conference, but these occurred *after* suit was filed. Surely, meetings held in an effort to compromise a lawsuit and to reach an amicable settlement of a controversy cannot be regarded as constituting waiver or estoppel.

The truth of the matter is that at no time did appellee ever waive its rights under the policy or admit liability thereunder. The best evidence of this is that no payment of any kind was ever made or promised to appellant on account of this claim, (J.A. 7). In short, appellee has always stood on its rights and required performance by appellant of its contractual obligations. This, for reasons of its own, appellant has neglected or refused to do. It strives now to excuse its conduct by pointing the finger of blame to appellee. The record does not support this position and the trial court correctly and expressly so found.

II. *Condition 7 of the Insurance Contract is a Valid Condition Precedent, and Non-Performance of This Condition Precludes Recovery by Appellant on the Contract.*

The validity and enforceability of limitations on the time for filing proofs of loss under insurance contracts were specifically recognized by the Supreme Court in *Riddlesbarger* v. *Hartford Fire Ins. Co.*, 74 U.S. (7 Wall.) 386 (1869), where the court stated:

> It is clearly for the interest of insurance companies that the extent of losses sustained by them should be speedily ascertained, and it is equally for the interest of the assured that the losses should be speedily adjusted and paid. *The conditions in policies requiring notice of losses to be given, and proofs of the amount to be furnished the insurers within certain prescribed periods must be strictly complied with to enable the assured to recover* . . . . The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses. (Emphasis added.)

This is the uniform rule in the District of Columbia and the other federal courts. *Adelman* v. *St. Louis Fire and Marine Ins. Co.*, 110 U.S. App. D.C. 392, 293 F.2d 869, *cert. denied*, 368 U.S. 937 (1961) (by implication); *United States Shipping Bd., ex rel. United States* v. *Aetna Cas. & Sur. Co.*, 68 App. D.C. 366, 98 F.2d 238 (1938); *Fidelity-Phenix Fire Ins. Co.* v. *Haywood*, 71 F.2d 834 (6th Cir. 1934); *Niagara Fire Ins. Co.* v. *Pospisil*, 52 F.2d 709 (8th Cir. 1931); *Home Bldg. & Sav. Ass'n* v. *New Amsterdam Cas. Co.*, 45 F.2d 989 (8th Cir. 1930); *Maryland Cas. Co.* v. *Massey*, 38 F.2d 724 (6th Cir.), *cert. denied*, 282 U.S. 853 (1930); *Harris* v. *North British & Mercantile Trade Co.*, 30 F.2d 94 (5th Cir.), *cert. denied*, 279 U.S. 852 (1929).

Condition 7 of the insurance contract in this case provides that written proof of loss must be filed within 90 days of the discovery of loss. Appellant has apparently abandoned the contention made below that there was compliance with this condition. It apparently now concedes non-performance. It follows from this non-performance and from the applicable authorities that appellant's failure to so perform precludes it from recovery under the contract. The applicable rule was set forth by the Supreme Court in *Imperial Fire Ins. Co.* v. *Coos County*, 151 U.S. 452, 462-463 (1894):

> Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore may justly insist upon the fulfilment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within these terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery.

III. *The Memorandum of October 9, 1959 did not Constitute a Waiver, Express or Implied, of the Policy Provision nor was it an Extension of the Filing Period.*

Appellant in part I of its Argument, contends that the memorandum of the conference of October 9, 1959 between a representative of appellee and appellant's president, attorney and accountant constituted a waiver of the

policy provision requiring the filing of a proof of loss within 90 days from the discovery of such loss or an extension of the filing period. As indicated by the record, this meeting concerned itself with a general discussion of the loss and the procedure to be followed. At the conclusion thereof, a memorandum of the conference was dictated by appellant's accountant, (J.A. 63). The concluding paragraph of said memorandum recited as follows:

> The representative of Ace Van & Storage, Inc. and of Liberty Mutual Insurance Company will continue the investigation to as prompt a disposition of this matter as is reasonably possible.

The meaning of this paragraph would seem to be clear enough. Yet, through the self-serving testimony of its president and its accountant, appellant seeks to foist on this Court a construction of this memorandum which strains language beyond the bounds of credulity. A cursory reading of the quoted paragraph totally refutes this "hindsight construction." The incredibility of appellant's position is further heightened by the fact that its attorney, an experienced practitioner, was present at the conference and at the drafting of the memorandum. If, as appellant contends, it was the intention of the parties that the memorandum serve as an extension of the policy period for filing the proof of loss, or a waiver thereof, it would have been a simple matter to have expressed such an intention in fitting language. It is incomprehensible that appellant's attorney would have permitted this alleged waiver to be drafted in such a manner. The trial court was of the same view and made a specific finding to the effect that this memorandum did not constitute any agreement on the part of appellee to waive the policy provision, (Finding of Fact No. 12, J.A. 113).

Further, Condition 7 of the policy specifically provides for extensions of the policy period and the procedure to

be followed. Appellant and its counsel were aware of this provision and they were bound by it as well as Condition 13 of the policy which provided the means whereby waivers or changes in any part of the policy might be established, (J.A. 110).

The language used by the court in *Missouri Pac. Ry.* v. *Western Assur. Co.*, 129 Fed. 610, 612-613 (C.C.D. Kan. 1904), would seem to be singularly applicable to the instant case. There, in discussing the stipulated procedure in insurance policies for providing extensions of time, the court commented at 612-613:

> However, in the event this period of time for any reason proves insufficient, and an extension of time is desired by the insured, the parties to the contract have expressly stipulated, not that a waiver on the part of the company of the failure of the assured to furnish "proofs of loss" within the 60 days required by the terms of the contract may not be shown, but, *in order that the entire engagement and obligation of the company may rest in writing, and not in the fickle memory of interested parties as witnesses*, it is stipulated that such waiver, if any, must rest in a writing to that effect, executed in such manner as will bind the company. (Emphasis added.)

In this case, appellant seeks to construe clear and unambiguous language in a manner never envisioned by the parties at the time the memorandum was prepared. This Humpty Dumpty construction that "a word . . . means just what I choose it to mean, neither more or less" was rejected by the lower court and should not be countenanced by this Court.

Finally, even on appellant's own grounds, and, assuming *arguendo*, that the memorandum language was ambiguous, appellant's construction must be rejected because of the time-honored and well-settled rule that, in case of ambiguity in a written instrument, all doubts

concerning construction should be resolved against the party preparing it. This document was drafted by appellant's accountant and therefore all doubts should thus be resolved in favor of appellee.

IV. *Appellee Never Waived the Policy Requirements Nor is it Estopped From Setting Up Appellant's Nonperformance of the Contract as a Defense.*

It is clear that appellee was not guilty of any waiver or estoppel prior to the expiration of the time for filing the proof of loss. For reasons of its own appellant did not perform this condition of the insurance contract. No action on the part of the appellee after the expiration of the filing period could have constituted a waiver or an estoppel. The applicable rule in such an instance is set forth in *Lambert* v. *Travelers Fire Ins. Co.*, 274 F.2d 685, 688 (5th Cir. 1960):

> In the case before us, the period for making proof of loss had expired when liability was denied and there could be no belief induced on the part of the insured by the denial that compliance would not be required *since compliance was then impossible.* . . . The facts relied upon to constitute a waiver must occur before the time for filing the proof of loss has expired. (Emphasis added.)

The cases are substantially in accord with the *Lambert* case that the conduct of the insurer must mislead the insured or lull him into a sense of security and that such conduct must occur prior to the expiration of the policy period for filing proof of loss. See, *e.g.*, *J. T. Knight & Son* v. *Superior Fire Ins. Co.*, 80 F.2d 311, 313 (5th Cir. 1935), *cert. denied*, 298 U.S. 654 (1936); *Maryland Cas. Co.* v. *Nellis*, 75 F.2d 23, 25 (6th Cir.), *cert. denied*, 296 U.S. 615 (1935); *National City Bank* v. *National Sec. Co.*, 58 F.2d 7, 10 (6th Cir. 1932); *Lewis* v. *Commercial Cas. Co.*, 142 Md. 472, 483, 121 Atl. 259 (1923); *Sinincrope* v. *Hartford Fire Ins. Co.*, 207 App. Div. 114, 201

N.Y. Supp. 615, 618 (1923); *Stoyer* v. *Franklin Fire Ins. Co.*, 114 Pa. Super. 555, 174 Atl. 628, 630 (1934).

The rationale behind this rule was stated in *Greyhound Corp.* v. *Excess Ins. Co. of America*, 233 F.2d 630 (5th Cir. 1956), where the court, quoting from *Insurance Co.* v. *Wolff*, 95 U.S. 326, noted at 637:

> "The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions."

This view is echoed in *Oakley Grain & Supply Co.* v. *Indemnity Ins. Co. of North America*, 173 F. Supp. 419 (S.D. Ill. 1959). There, the court quoted from *Buysse* v. *Connecticut Fire Ins. Co.*, 240 Ill. App. 324 (1926), and held at 421-422:

> "The rule, that an insurance company which has claimed a forfeiture for non compliance with certain specified conditions of the policy, cannot be afterward heard to assert different matters in defense, has no application to a case where it is sought to show a waiver of proofs of loss by a denial of liability made *after the time for furnishing such proofs has expired.* The doctrines of waiver and estoppel are fundamentally equitable doctrines and are based upon the principle that it would be wrong to permit an insurer to insist upon a forfeiture after it has induced the insurer to alter his position to his prejudice, or to do or omit to do anything which he would otherwise have omitted or done. . . . While it is true that if an insurer, during the time allowed the insured for submitting proofs of loss, denied all liability or by its conduct leads the insured to believe he

> need not submit such proofs, the requirement for them is waived; but in the absence of such circumstances and after the time for submitting proofs has expired, an insurance company may rely on a failure to furnish proofs of loss although it may have denied liability on some other ground. It will not then be restricted to a single defense simply because it has specified but one in a letter or statement refusing or denying liability."

Appellee maintains, in addition, that it is guilty of no conduct, either prior to or after the expiration of the filing time, which would constitute a waiver or an estoppel. The record clearly shows that appellee, at all times, insisted upon performance of the contract conditions by appellant. Nowhere in the record is there evidence that appellant was ever misled or lulled into a feeling of security by the action of appellee. The trial court, upon a full hearing of the facts, expressly so found, (Finding of Fact No. 11, J.A. 113).

Appellant argues that appellee's silence after receipt of the untimely proofs of loss constituted waiver. Yet, this is not a case where the proofs were filed on time but were defective. In such a case, it is clear that the insurer is under a duty to so inform the insured in order that the latter may cure the defect. Where the proof of loss is untimely, however, the insured cannot cure the defect. The act of nonperformance is beyond repair. In such an instance the insurer is under no duty to notify the insured since this would be a useless act. Appellant also contends that appellee waived the policy requirements by attending a conference at which an investigative audit prepared by appellee was discussed. It is clear and settled law, however, that independent investigation of a claim by the insurer does not constitute a waiver or an estoppel. One of the cases cited by appellant so holds. *Federal Mut. Ins. Co.* v. *Lewis*, 231 Md. 587, 191 A.2d 437, 439 (1963). The insurer is entitled to inform itself

of the facts and circumstances attendant to the claim. A contrary holding would place insurance companies at the mercy of the insured since they could not undertake any investigation for fear that this would prejudice their rights to rely on performance by the insured of the policy provisions. Appellant does not contend that it was prejudiced or misled by appellee's routine investigation and in the absence of such factors it cannot rely on such as constituting a waiver or an estoppel. *United States Shipping Bd., ex rel. United States* v. *Aetna Cas. & Surety Co.*, 68 App. D.C. 366, 371, 98 F.2d 238 (1938); *Alexander* v. *Standard Acc. Ins. Co.*, 122 F.2d 995, 998 (10th Cir. 1941); *Shapiro* v. *Security Ins. Co.*, 256 Mass. 358, 152 N.E. 370, 372 (1926); *Stoyer* v. *Franklin Fire Ins. Co.*, 114 Pa. Super. 555, 174 Atl. 628, 630 (1934); *Kuck* v. *Citizens' Ins. Co.*, 90 Wash. 35, 155 Pac. 406 (1916).

Appellant argues that there was a course of negotiations and offers of settlement and that such constitute a waiver. As pointed out earlier, the record is devoid of any evidence to substantiate this allegation. Yet, assuming *arguendo* that there was such evidence, the cases hold that negotiations with the insured and a settlement offer made to the insured and rejected by it do not constitute a waiver or an estoppel. *Oakley Grain & Supply Co.* v. *Indemnity Ins. Co. of North America*, 173 F. Supp. 419, 421 (S.D. Ill. 1959); *Buysse* v. *Connecticut Fire Ins. Co.*, 240 Ill. App. 324, 328 (1926); *Smith* v. *Haverhill Mut. Fire Ins. Co.*, 83 Mass. (1 Allen) 297 (1861); *Lepak* v. *Commercial Cas. Ins. Co.*, 198 Minn. 134, 269 N.W. 89 (1936); *Stoyer* v. *Franklin Fire Ins. Co.*, 114 Pa. Super. 555, 174 Atl. 628, 630 (1934); *Lapcevic* v. *Lebanon Mut. Ins. Co.*, 40 Pa. Super. 294, 300 (1909).

It is clear that waiver must be pleaded and proved by the party who asserts it and it must be proved by clear and unequivocal evidence. *Neidhoefer* v. *Automobile Ins. Co.*, 182 F.2d 269, 273 (7th Cir. 1950); *Public Ware-*

houses v. *Fidelity & Deposit Co.*, 77 F.2d 831, 833 (2d Cir.) *cert. denied*, 296 U.S. 633 (1935); *Oakley Grain & Supply Co.* v. *Indemnity Ins. Co. of North America*, *supra* at 421. It is also held that only clear statements of an intention by the insurance company to relinquish a known right by an agent having authority to do so can constitute a waiver. *Public Warehouses* v. *Fidelity & Deposit Co.*, *supra*. Finally, as one of the cases cited by appellant correctly points out (*Federal Mutual Ins. Co.* v. *Lewis*, *supra*), the question of waiver of proof of loss is one for the finder of facts. In the instant case, it is evident that appellant has not shown waiver by clear and unequivocal evidence. Indeed, appellant's allegations, despite its misstatements of fact, are not supported by the record. Appellant has clearly failed to sustain its burden of proof and the finder of fact expressly so found.

V. *The Authorities Cited by Appellant Do Not Meet the Issues and to the Extent that they are Applicable Involve Different Factual Situations.*

The weakness of appellant's position is evidenced by the fact that none of the cases cited in its brief involve a situation where a factual finding for the insured was reversed by the appellate court. Indeed, the *Federal Mut. Ins. Co.* case cited by appellant at page 11 of its brief supports appellee's position in that it holds that the question of waiver of proof of loss is one for the finder of fact.

Eastover Stores, Inc., v. *Minnix*, 150 A.2d 884 (Ct. App. Md. 1959) and *Hill* v. *Benevicz*, 167 A.2d 111 (Ct. App. Md. 1961), are clearly distinguishable in that neither dealt with the issue at hand. The questions involved in these cases were provisions of a construction contract and a realty purchase contract, respectively.

Rokes v. *Amazon Ins. Co.*, 51 Md. 512, 34 Am. Rep. 323, involved a completely different factual pattern. In

that case the insurer requested and encouraged the filing of amended proofs by the insured and then sought to avoid liability by claiming that there had been no compliance with the policy. There was no such conduct in the instant case and *Rokes* is thus inapplicable. In the *McElroy* case (*McElroy* v. *John Hancock Mut. Life Ins. Co.*, 41 A. 112, 88 Md. 137, 71 Am. St. Rep. 400 (1898)), the insurer indicated by letters that the proofs filed were in proper form and then reversed its position, contending that the proofs were filed late. No such inconsistent action by the insurer presents itself in the instant case. In *Citizens Mut. Fire Ins. Co.* v. *Conowingo Bridge Co.*, 116 Md. 422, 82 A. 372 (1911), the insurer recognized the validity of the policy and later sought to deny liability and the appellate court affirmed a judgment for the plaintiff. Again, the instant case is distinguishable on its facts since the record shows that, at no time, did appellee admit liability, but instead always insisted on performance by appellant of its contractual obligations.

Kearney v. *Security Ins. Co.*, 67 Pa. Super. Ct. 179, was a case where the proof of loss was filed on time, but the insurer later claimed that it was defective. Silence, in such situations, by the insurer will estop it from later relying on the defect. The instant case involves the timeliness of the filing of a proof of loss, a completely different situation. *Franklin Fire Ins. Co.* v. *Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469, and *Firemen's Ins. Co.* v. *Floss*, 67 Md. 403, are also *defective proof* cases and they do not constitute valid authority in cases involving the timeliness of filing proofs.

The case of *Tero Petroff & Co.* v. *Equity F. Ins., Co.*, 183 Iowa 906, 167 N.W. 660, likewise deals with a complete different factual situation and is inapposite. In *Dierssen* v. *Williamsburg City F. Ins. Co.*, 204 Ill. App. 240, the court held that the proof of loss was filed in time and thus this case is altogether inapplicable.

Travelers Fire Ins. Co. v. *Robertson*, 103 Ga. App. 816, 120 S.E.2d 657 (1961), *Pasherstnik* v. *Continental Ins. Co.*, 67 Mont. 19, 214 Pac. 603 (1923), and *Campbell* v. *National F. Ins. Co.* (Mo. App.) 269 S.W. 645, all dealt with cases where there was a jury finding of waiver or estoppel in favor of the insured which was affirmed on the grounds that there was evidence to justify such a finding. In the instant case a finding of fact was made that there was no waiver or estoppel. The situations are clearly different. In addition, in both the *Travelers* and the *Pasherstnik* cases the conduct which was deemed to constitute waiver or estoppel occurred prior to the expiration of the filing period, thus misleading the insured to his prejudice. As has been shown, there was no such misleading in the instant case and appellant does not so contend.

Finally, in a vain attempt to distinguish the District of Columbia cases of *Glenco Corp.* v. *American Equitable Assurance Co.*, 110 U.S. App. D.C. 158, 289 F.2d 899 (1961), and *Adelman* v. *St. Louis Fire & Marine Ins. Co.*, 110 U.S. Ap. D.C. 392, 293 F.2d 869 (1961), *cert. denied*, 368 U.S. 937, appellant has apparently misinterpreted these cases. Appellant states that these cases are distinguishable in that there were no "settlement negotiations" and no "course of settlement conduct" there. Yet, a reading of these opinions fails to disclose whether or not there were settlement negotiations.

Appellee submits that the instant case falls squarely within the lnguage of the *Adelman* case:

> The court finds that there was no expression of any willingness on the part of defendant to proceed with the question of liability without securing written proof of loss or any representation or statement to the insured which might lead them to assume that the requirement might be dispensed with, or to make them delay compliance, nor were there any other

statements or acts by the adjuster which could reasonably be construed to constitute a waiver of the requirement to file written proof of loss within the 60 days. (110 U.S. App. D.C. at 393, 293 F.2d at 870).

Conclusion

The issues raised by appellant were all decided by the trial court in appellee's favor. Specific findings of fact were made by the trial court to the effect that there was no waiver by appellee of the policy requirements for filing proof of loss nor any estoppel which would preclude appellee from setting up appellant's nonperformance as a defense. Appellant has not shown these findings to be clearly erroneous. Indeed, the record clearly refutes such a contention for it offers ample support for the trial court's findings. Appellant's contentions, on the other hand, find no such support. The trial court should be affirmed.

Respectfully submitted,

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